



Military Law Review

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Pamphlet

No. 27-100-129

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Summer* 1990

MILITARY LAW REVIEW—VOL. 129

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of such periodicals should address inquiries to the Editor of the *Review*.

Inquiries concerning subscriptions for active Army legal offices, other Federal agencies, and JAGC officers in the ARNGUS not on active duty should be addressed to the Editor of the *Review*. The editorial staff uses address tapes furnished by the U.S. Army Reserve Personnel Center to send the *Review* to JAGC officers in the USAR; Reserve judge advocates should promptly inform the Reserve Personnel Center of address changes. Judge advocates of other military departments should request distribution from their service's publication channels.

CITATION: This issue of the *Review* may be cited as 129Mil. L. Rev. (number of page) (1990). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and were replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101, and a cumulative index for volumes 102-111 appears in volume 111. Volume 121 contains a cumulative index for volumes 112-121.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to U.S. Government Periodicals*; *Legal Resources Index*; three computerized data bases, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infodata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

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SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (hereinafter TJAGSA). Authors should also submit a 5 1/4 inch or 3 1/2 inch computer diskette containing their articles in an IBM-compatible format.

Footnotes also must be typed double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (14th ed. 1986), copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 4th ed. 1988) (available through the Defense Technical Information Center, ordering number AD B124193). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School; the Director, Developments, Doctrine, and Literature Department; and the Editor of the *Review*. They are assisted by instructors from the teaching divisions of the School's Academic Department. The Board submits its recommendations to the Commandant, TJAGSA, who has final approval authority for writings published in the *Review*. The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

PROFESSIONAL WRITING AWARD FOR 1988 AND 1989

Each year the Association of Alumni of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The Professional Writing Award acknowledges outstanding legal writing and is designed to encourage authors to add to the body of scholarly legal writing available to the legal community. The award consists of a citation signed by The Judge Advocate General, an engraved plaque, and a set of quill pens.

Captain David C. Rodearmel received the 1988 award for his article, *Military Law in Communist China: Development, Structure and Function*, which appeared at 119 Mil. L. Rev. 1 (1988). Captain Rodearmel's article is an excellent survey of the history, development, and structure of the current military justice system in the People's Republic of China. His research is outstanding, and the paper is well organized. The article is especially noteworthy because of the difficulty encountered in researching military legal developments in China. Captain Rodearmel's article contributes significantly to the body of literature concerning legal systems of other countries. This issue of the *Military Law Review* contains a reply to Captain Rodearmel's article, in which General Zhang Chi Sun of the People's Republic of China compliments Captain Rodearmel's article and provides additional information on Chinese military law.

Major David L. Hayden received the 1989 award for his article, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, which appeared at 123 Mil. L. Rev. 31 (1989). Major Hayden's article is an excellent survey of the history and development of rules of privilege in criminal cases, specifically those rules involving patients and their communications to their therapists. His research included an original survey of Army psychiatrists. His article is well written and clearly organized, and his analysis contributes significantly to the body of literature concerning privileges.

THESIS TOPICS OF THE 38TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

Nine students from the 38th Judge Advocate Officer Graduate Course, which graduated in May 1990, participated in the Thesis Program. The Thesis Program is an optional part of the LL.M. curriculum. It provides students an opportunity to exercise and improve analytical, research, and writing skills and, equally important, to produce publishable articles that will contribute materially to the military legal community.

All graduate course theses, including those of the 38th Graduate Course, are available for reading in the library of The Judge Advocate General's School. They are excellent research sources. In addition, many are published in the *Military Law Review*.

The following is a listing, by author and title, of the theses of the 38th Judge Advocate Officer Graduate Course:

Major John F. Burnette, *An Argument for Partial Admissibility of Polygraph Results in Trials by Courts-Martial*.

Captain James P. Calve, *Environmental Crimes and the Federal Employee: Environmental Compliance is Part of the Mission*.

Major Robert L. Charles, *Legal Representation for Health Care Providers at Adverse Privileging Hearings*.

Captain Mark J. Connor, *Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?*

Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historic, and Legal Perspectives*.

Captain Natalie L. Griffin, *The Wages of Federal Employees: Can We Talk?*

Captain David B. Howlett, *Illegitimate Children and Military Benefits*.

Captain Lawrence J. Morris, *Withholding Food and Water From Vegetative Patients in Military Hospitals: Constitutional and Practical Concerns*.

Major Richard V. Pregent, *Presidential Authority to Displace Customary International Law*.

CAN WE AFFORD THE BILL OF RIGHTS?

by Honorable Arthur J. Goldberg*

EDITOR'S NOTE: This is part of the Military Law Review's continuing series of articles in celebration of the Bicentennial of the Constitution of the United States. Justice Goldberg delivered this Law Day address at the United States Military Academy, West Point, New York, on May 1, 1989.

This Law Day commemorates the 200th Bicentennial of the approval of the Bill of Rights. You, of course, recall that our Constitution would not have been ratified were it not for a commitment by the Founding Fathers that a Bill of Rights would be included. The Bill of Rights, therefore, is to be regarded as an integral part of the original document.

Adlai Stevenson said of the Bill of Rights: "Our farms and factories may give us our living. But the Bill of Rights gives us our **life**."¹ And President Truman in his direct way said, "The Bill of Rights, contained in the first ten amendments to the Constitution, is every American's guarantee of **freedom**."²

The revolutionaries who founded our republic had no doubt that "[t]he God who gave us life, gave us liberty at the same time."³ And, in defense of liberty, they pledged their lives, their fortunes and their sacred Honor.

Today, unlike the thirteen colonies, isolated and without material resources, we are the greatest superpower in the world. We are possessed of a nuclear arsenal, which as a deterrent has kept the peace for more than forty years. Despite intolerable pockets of poverty, most of our people are affluent far beyond the dreams of the creators of a new and unprecedented democracy. And yet a recent Gallup poll shows that a majority of Americans doubt that we can afford the liberty guaranteed by the Bill of Rights and proclaimed by our nation's creators as the guarantee of our freedom. Why is this so?

*Former Associate Justice of the Supreme Court of the United States.

¹4 The Papers of Adlai E. Stevenson 252 (W. Johnson ed. 1972-1979).

²2 H. Truman, *Memoirs* 269 (1956).

³Thomas Jefferson, *quoted in* J. Bartlett, *Familiar Quotations* 470 (E. Beck 14th ed. 1968).

There is a crisis in American law, a crisis reflecting the uncertainty of American society today. We are understandably concerned about the prevalence of crime. This growing concern with the rising rate of crime has led to a search for solutions that has yielded only frustration, and frustration has led to drastic measures. Among them have been various proposals to amend the Constitution or to legislatively overrule recent Supreme Court interpretations of the Bill of Rights in the hope that law and order may thereby be "restored." Some of the proposals have been converted into convenient slogans such as "Take the handcuffs off the police!" and have captured the imagination of the public. Even more sophisticated suggestions are based on the idea of "liberating" officials from constitutional restraints. Critics propose to alter the fundamental balance—established in the Bill of Rights—between the power of government and the autonomy of the individual. The Bill of Rights, we are told, should be "adjusted" to meet our concern with crime.

We more or less see how the first amendment protects us all. But the rights of a suspected criminal guaranteed by the Bill of Rights seem less personal. His or her rights are often characterized as self-imposed restraints that the law-abiding members of society have adopted only out of an exaggerated sense of fair play. When a confession or illegally-seized evidence is excluded from a criminal trial, or when an alleged criminal is provided the right to counsel, or, after careful review, is granted bail pending trial, we hear that we cannot afford to give such an advantage to the adversary. But the Bill of Rights is not just protecting "someone else." It protects us all, for to trim the privileges the Bill of Rights accords is to trim the autonomy of every individual, which is the essence of the Bill of Rights.

The fourth, fifth, sixth, and ninth amendments are some of the most effective and visible means of restricting governmental intrusion into the privacy of the individual. Yet the most vocal attacks on crime take shape as attacks on these amendments. The rising crime rate is associated with Supreme Court rulings enforcing the privileges against self-incrimination and unreasonable searches and seizures and erecting the right of privacy to constitutional dimensions. Critics, in the name of "law and order," seem to believe that if these privileges were eliminated or weakened, there would be more confessions and better evidence and that therefore there would be fewer crimes and we would all be better off. But they offer no evidence that limiting these amendments would substantially reduce crime. They really propose that we speculate with the liberty we enjoy in order to receive benefits that may not exist.

The privilege against unreasonable searches and seizures protected by the fourth amendment derives from our Declaration of Independence and from the abuse in colonial times of the invasion of private homes and writings by use of the general warrant. The privilege not to “be compelled in any criminal case to be a witness against himself” derives from an earlier, more cruel age than ours. Those familiar with British practices, before our Revolution, do not wonder at the necessity of a privilege to remain silent in the face of a criminal accusation. Scholars are too familiar with torture and long imprisonment then practiced as a means of acquiring information. The Bill of Rights erected a privilege to bar such medieval practices. But the Middle Ages are past. Why do we still have the fifth amendment? One reason is the fear that without the privilege, extorted confessions would continue to plague us.

Even with the fifth amendment, much coercive interrogation still takes place. If this is doubtful, read recent decisions of the Supreme Court. Actual physical brutality is not the only means of coercion employed. Threats and promises can be equally effective in breaking the will of a suspect. For the state to close around a lone suspect and to intimidate him into confessing is not only unseemly, but it is also dangerous. If a little fear makes a guilty man confess, a lot might move an innocent man to admit guilt. More likely, it makes a minor criminal exaggerate his criminal activities, clearing the police files of unsolved crimes. These realities are too common, as the reported cases show, and judicial enforcement of the fifth amendment and the sixth, making counsel available, is the primary means of controlling their occurrence.

Perhaps the best way to appreciate what the privilege against self-incrimination and the right to counsel really mean is to imagine a system without them. There are, of course, countries that have neither the fourth, fifth, nor sixth amendments. They have developed intolerable restraints in dealings between state and citizen. The proven record of coercion in totalitarian countries establishes that there is no substitute for these amendments and their enforcement. Repeal in the present context would hardly provoke a search for substitutes. If we “liberate” our officialdom from the strictures of the Bill of Rights, it will not be because the officials have so internationalized its value as to render it superfluous. Rather, it will be because we have decided we can no longer afford the restraints it imposes. Politically, repeal would represent positive encouragement to do what formerly the amendments prohibited. What could happen without the amendments would seem to many to be a whole new order of government behavior. One can imagine an investigator calling a

citizen in for a chat about the events of the last few days, weeks, or years: "Come down to the station. And bring your diary with you." What crimes have been committed in the vicinity in the last month? Undoubtedly, there have been many. One's whereabouts every minute of the time is therefore relevant to a whole list of unsolved crimes. "Do you take a morning walk? Why that route?" At this point the citizen may keep silent, which will no doubt interest a jury, or he will have to defend his innocent private habits.

But the Bill of Rights does not protect us only against embarrassment or fear of prosecution. It keeps us out of jail. More than four hundred years ago Montaigne wrote, "There is no man so good, who, were he to submit all his thoughts and actions to the laws, would not deserve hanging ten times in his life."⁴ In the intervening centuries the number of crimes for which we may "deserve hanging" has been reduced, but the number for which we may be imprisoned has multiplied virtually a hundredfold. How many tax underpayments are the result of unwitting errors by the taxpayers? How much simpler prosecution would be if the taxpayer could be interrogated alone, with neither lawyer nor records on hand. When one in fact declares too little and refuses to talk, that refusal will most likely indicate the existence of fraudulent intent to a jury. Yet silence may be the result not of fraud, but of innocent bewilderment.

There are more insidious possibilities for law enforcement in the post-fourth, fifth, and sixth amendments era. Instead of investigating specific crimes in which a suspect might have been implicated, the state could call in its citizens for general interrogations. Who has not wittingly or unwittingly exceeded the speed limit, littered the sidewalk, or walked against the red light? When asked, "Have you committed any crimes?" what does one say? To say no is to lie; if this is done in court, it is perjury, and out of court it may very well constitute the crime of obstructing justice. To confess means that one will be found guilty and punished simply because some official, for reasons that will never be known, has singled one out. In effect, the state can make either a criminal or a perjurer out of almost anyone it chooses. Pity the unfortunate man who falls out of favor with his local district attorney!

Even those who fall on the right side of the prosecutor's discretion today ought not to be so sure that they can get along better without, for example, the fifth amendment. More than forty years ago the clamor of McCarthyism threatened the privilege against self-

⁴Quoted in J. Bartlett, *supra* note 3, at 191.

incrimination. That campaign was not directed against street crime, but against the right to hold one's own political beliefs, the right to differ with Senator McCarthy's credo without having to suffer public harassment and blacklisting. McCarthy is gone, and we and the fifth amendment have survived, but that is no assurance that another witch hunt will not occur. The fifth amendment, even if it sometimes pinches, is an essential part of our insurance for that today.

It is not just the fifth and sixth amendments, but our whole heritage of individual liberty that rejects undue inquisitorial law enforcement. It is argued that it will be more difficult to catch criminals if we cannot make them confess. Of course, there are times when no other evidence is available, although not so often as is frequently asserted. I must emphasize, however, that liberty is worth this small price. We should not rush to abandon our autonomy as individuals just because it creates inefficiencies in the apprehension of criminals. When it is said that democracy is an inefficient means for determining policy, we should not rush to abandon democracy. We are justifiably concerned with crime, but the power of the criminal is nothing compared to the power of the state. As a great statesman once said, "democracy is the worst form of Government except all those other forms."⁵

But proponents of new measures argue that to "adjust" the fifth and sixth amendments is not to unleash the entire force of the state. They argue that the Bill of Rights that protects us against arbitrary intrusions by the state is something different from recent judicial interpretations, as some have recently asserted. It is said that the courts have enacted a new code of criminal procedure under the guise of interpreting the Constitution. It is true that the Supreme Court has prescribed rules of a specificity that are understandably not present in the Constitution. But such rules are the only way to make the Constitution a reality. When *Wolf v. Colorado*⁶ left enforcement of the fourth amendment to the states, it was too widely taken as a green light to search and seize at will. The specificity of *Mapp v. Ohio*,⁷ *Miranda v. Arizona*,⁸ and *Escobedo v. Illinois*⁹ has been necessary to assure a fair trial and justice when the states refuse to enforce the exclusionary rule, to provide counsel, and to ensure

⁵⁷ Winston S. Churchill: *His Complete Speeches 7566* (R. James ed. 1974) [hereinafter Churchill].

⁶338 U.S. 25 (1949).

⁷367 U.S. 643 (1961).

⁸384 U.S. 436 (1966).

⁹378 U.S. 478 (1964).

that one is not compelled to be a witness against himself or herself. The test of the constitutionality of a confession has long been voluntariness. A confession cannot constitutionally be beaten out of a suspect. It can, however, be extracted through more subtle psychological pressures playing upon the fears of the suspect. What the Court did in *Miranda* and *Escobedo* was to apply the same standards to the reality that confronts the poor and ignorant defendant. Organized criminals have their lawyers and know enough to call them when they confront the law. When they volunteer a confession it is the result of a bargain—they exchange their help to the police for lesser charges and lighter sentences. But a lawyerless defendant facing the law for the first time is unaware of the possibilities for bargaining. For him, the Orwellian model of law enforcement I have described is too often the reality. Ignorant of his rights, the suspect sees no limit to what his captors can do. Indeed, interrogation manuals suggest creating this impression. And even if there are limits, who enforces them against the police? The suspect in this position frequently has no real choice in his behavior. This produces results for the inquisitor. It also provides an incentive to violate other rights.

It is clear that it would be the poor, disproportionate numbers of whom are black, and other minorities who would be affected if *Miranda*, *Escobedo*, and *Gideon v. Wainwright*¹⁰ were overturned. Organized criminals do not talk, even in the face of illegal threats. The police are usually careful not to harass well-to-do suspects who have lawyers anyway. So, in effect, a separate system of interrogation is established for the poor and minorities. The counter-argument is that all that is sought is an efficient system of criminal investigation, which accidentally affects the poor and minorities somewhat differently than others. It is a fact of life that they suffer in many ways. This may be a fact of life, but not one we can overlook when, in the name of practical necessity, a change of rules is proposed. It is a change that will affect the poor more than others and a change that will put greater pressure on this already disadvantaged group without really affecting the rights of the more affluent.

It is argued that questioning only residents of high-crime areas will uncover more street criminals than questioning only residents of low-crime areas. This may be true, but we cannot ignore the fact that the discrimination occasioned by the use of these separate systems of law enforcement will not be perceived by the poor and minorities as either justifiable or reasonable. They know that whatever hap-

¹⁰372 U.S. 335 (1963).

pens to the fifth and sixth amendments, business crime suspects are unlikely to be grilled at the station house without advice of counsel. And this may explain why proposals to weaken these amendments come mainly from the more affluent members of society.

Critics assert that the protection of the fourth, fifth, and sixth amendments exacts its price through crime. But there has been no showing that abrogation of these amendments will significantly affect the crime rate. Interrogation is a technique for solving crimes, not for preventing them. Even in solving crimes, confessions are not usually essential. Several district attorneys and a recent report by the Dash Commission have concluded that the *Miranda* warning has not significantly affected the conviction rate. I venture to say that the same is true of the safeguards of the Code of Military Justice. And I am sure that the safeguards of the Code have immeasurably improved the morale of our armed forces without weakening them.

It is not the Supreme Court that has caused the startling rise in urban crime, but rather the way our society handles the availability of addictive drugs, handguns, and semi-automatic guns, and the way our society fails to provide jobs or to eliminate discrimination. In virtually all of our cities an appalling proportion of certain crimes is committed by the poor and deprived, drug addicts, and minorities. These are sources of criminal conduct about which we can do something constructive. We can and must do better in dealing with unemployment and eliminating discrimination. The cause of crime by addicts is almost always the need for money to support a habit. Simply prescribing maintenance doses of the addictive drug with methadone and counseling, either free or at a nominal cost, would eliminate a substantial cause of crime. The English addict population has remained both small and law-abiding while receiving legal maintenance doses of drugs, along with treatment. And importantly, such a program eliminates the exorbitant profits now extorted by pushers, even at the high school level.

Uncontrolled ownership of handguns and semi-automatic rifles, neither of which are hunting guns, also contributes to violence, as we have learned from the assassination attempts on President Reagan, Robert Kennedy, and other innocent persons. The mere availability of such a gun has turned more than one disturbed person, drug addict, or quarreling family member into a murderer. Easy access to such weapons paves the way for assassins, terrorists, armed robbers, drug addicts, and the mentally ill. This is again a problem about which we have the power to do something, yet we have continually failed to enact adequate measures. It is ironic that some of

the most vociferous opponents of the Supreme Court also oppose gun control legislation. If they really wish to control crime and preserve liberty, their positions should be reversed on both issues.

Experimentation with such steps and efforts to eliminate underlying causes are practical approaches to the crime problem. If these kinds of proposals do not work out in practice, they can be modified or abandoned. But constitutional experimentation is far more difficult and dangerous. Constitutional restrictions serve a more complex function than statutes and judicial decisions. The constitutional rule, by instructing officialdom about its primary duties to the citizenry, educates it as to the policies underlying the rule. It inculcates a basic respect for individual dignity. To alter the rules too often devalues the social policy underlying them. The entire relationship between citizen and state is altered, with results neither foreseen nor easily corrected. Perhaps for these reasons we have never fundamentally altered the Constitution. And we have never even tampered with the Bill of Rights. Establishing the basic relationship between the citizen and the state is the most important and difficult task of the constitution-maker. The arrangement must last far beyond what the wisest man can foresee.

In fighting crimes, we must not overlook the plight of victims of crime. In a very real sense, they are being denied by the state the protection of its laws. And because this is the case, the state should, as far as possible and practical, compensate victims of crime for the failure of the law's protections. Some states and the Federal Government have done so, but not adequately.

Times of stress, even more than bad times, can make bad law. It would be bad law and bad policy to weaken the Bill of Rights or Supreme Court decisions enforcing the palladium of our liberties. It is even truer today than it was some two hundred years ago that we can afford the Bill of Rights and its guarantees of our liberty.

Finally, I would like to conclude with a quotation from that arch-conservative, Sir Winston Churchill. This great British Prime Minister said in a speech delivered in the House of Commons, on July 20, 1910, when he was Home Secretary:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of

convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it."

Sir Winston was saying more eloquently what I have been attempting to say in this address, that we can indeed afford liberty and that it is the mark of a civilized society to protect the rights of alleged criminals even when protection of these rights is regarded by many to be detrimental to an ordered society. The achievement of liberty safeguarded by the Bill of Rights is not repression; it is the protection of the principles that, even at some cost, have been the ultimate safeguard of our freedoms.

Edward Everett, the great orator of the Civil War era, said: "Teach us the love of liberty protected by the law."

This is the profound teaching of the Bill of Rights. This is why we are commemorating this great charter of our liberty and freedom in its Bicentennial year.

¹¹2 Churchill, *supra* note 5, at 1598.

THE NINETEENTH ANNUAL KENNETH J. HODSON LECTURE: MILITARY LAWYER ETHICS

by Dean John Jay Douglass

Dean, National College of District Attorneys and
Professor of Law, University of Houston School of Law

The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on June 24, 1971. The chair was named after Major General Hodson, who served as The Judge Advocate General from 1967 to 1971. General Hodson retired in 1971, but was immediately recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty. During that time, he was active in the American and Federal Bar Associations, and he authored much of the federal military justice legislation existing today. He was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Corps.

On February 22, 1990, Dean John Jay Douglass delivered the nineteenth Kenneth J. Hodson Lecture. Dean Douglass received an A.B. (with distinction) from the University of Nebraska, a J.D. (with distinction) from the University of Michigan School of Law, an M.A. from George Washington University, and an LL.M. from the University of Virginia School of Law. He was a member of the U.S. Army Judge Advocate General's Corps from 1952 until he retired in 1974. His assignments included Staff Judge Advocate, Ft. Riley; Military Judge; Senior Judge Advocate, Vietnam; and Commandant of The Judge Advocate General's School. While he was serving as the Commandant, he established the Kenneth J. Hodson Chair in Criminal Law. His military schooling includes the Command and General Staff College and the U.S. Army War College. Dean Douglass is the Editor of Ethical Issues in Prosecution and of a series of books, Roles and Functions of the Prosecutor. He has also published several articles in the Federal Bar Journal, Hastings Law Review, Journal of Legal Education, International Lawyer, Military Law Review, and other publications.

I. INTRODUCTION

I am delighted be back at the School and to visit Charlottesville once again. My son-in-law is on the faculty of the University of Virginia and I have a family here, and we have retained our farm, The Arrows, in Albemarle County. I look back on my assignment as Commandant as one of the most enjoyable assignments of my military career. The pleasure comes from the opportunity the Commandant has to be a lawyer, diplomat, educator, administrator, and post commander.

It was particularly pleasurable for me to be asked to give the Hodson lecture. I remember clearly the establishment of the Hodson Chair in Criminal Law during my tenure. It is interesting that the first occupant of the Chair was the recently retired Judge Advocate General, Hugh Overholt.

It is most fitting and appropriate that my topic for this Hodson lecture is on the subject of military lawyer ethics. I know of no officer who more exemplified integrity and professionalism during a long and distinguished career than Kenneth Hodson.

A lawyer's professional responsibility includes the responsibility to work to improve the law and to work through bar groups to accomplish these improvements. This includes the lawyers in uniform, who have a special responsibility in this regard because of their peculiar knowledge of the military application of the law. It is unfortunate that too few have accepted this responsibility and consequently have left it to the uninformed to change the law. All too few lawyers in uniform are members of the American Bar Association or other professional associations, and even fewer participate actively in the work of these organizations.

No one has ever done more than General Hodson, both while in the Army and subsequent to his retirement, to carry out this lawyerly responsibility. Within the American Bar Association, he served for many years as secretary of the Criminal Justice Section, worked diligently as a member of the Criminal Justice Standards Committee (these Standards are a monument to his work), was a member of the House of Delegates representing the Judge Advocate Association, and recently was named by the President of the American Bar Association to chair a Special Committee on Programs for Public Service Lawyers. I am pleased to serve on that committee under his leadership. Whenever there is a big job, they call on Ken Hodson. General Hodson has always fulfilled the directions of Rule 6.1¹ 'urg-

¹Model Rules of Professional Conduct, Rule 6.1 (1989) [hereinafter Model Rules].

ing lawyers to render pro bono public service by offering service to improve the law, the legal system, and the legal profession.

I have long had an interest in legal ethics and more particularly those of the Army lawyers. When I was named Commandant twenty years ago, in my first orientation of the faculty I suggested that each lecture include two items: 1) an example as to the litigation aspects of the lecture and, 2) a reference to the ethical implications of the lecture.

I am not sure that this was always accomplished but it seemed important at the time. For several years following my retirement I traveled the country speaking on ethics problems of military lawyers. At that time, my lectures dealt mainly with trial advocacy ethics and the professional responsibility of military judges.

In the 1990's, one cannot be limited in discussing the ethics of military lawyers to the criminal law field. The concerns of military lawyers include many areas of the law other than criminal justice, though criminal trial advocacy remains the one area that generates far too many ethical problems. The legal activities of the *Corps* in the 1990's have far broader application than they did even fifteen years ago. Consequently any discussion of ethics and the lawyer in uniform must cover a far broader field. The extent of participation of military lawyers in contracts, environmental law, war powers, or administrative law far exceeds anything we believed possible a few short years ago.

11. PROFESSIONAL ETHICS

It is well to begin by taking a look at the role of ethics in the professions. Every profession is looking more closely at this important subject. Business schools are emphasizing the topic, as are law, medicine, and accounting schools. The military profession has taken a closer in-depth look at the ethics of the officer, especially since Vietnam.

At the outset you are reminded that even before you are lawyers, you are first officers in the Armed Forces. As military lawyers you do not face the terrible dilemmas of the combat officer. You do not send men to die, to destroy cities, or to order fire on civilians. Nevertheless, as advisors to those who do make these decisions, their ethical dilemmas are yours. This is so at least vicariously. Today each new weapon and its application are reviewed by military lawyers for legality, to include its relation to international law. Are there ethical implications to the review of these operations?

The ethic of the officer corps does apply. It is well to recall as a first axiom that the "essential attribute of the Army and its members is integrity. It is the personal honor of the individual"²

You have been encouraged to include in your reading list works on military ethics, including those by Richard Gabriel and Malkam Wakin.³ The book edited by Wakin includes some of the best known writers on military ethics and is worth study and consideration.

There was a time when a reminder that military lawyers were a part of the military profession would have fallen largely on deaf ears. I hope those days are gone forever. At that time there was a joke that the civilians did not believe we were lawyers, and that the military did not think we were officers. During the 1950's and 1960's, there were many in the Corps who resented being considered as part of the Officer Corps. The military is an honorable profession, equally as honorable as is the profession of law, and you are fortunate to be a part of both.

Colonel Dennis Coupe⁴ and Major Bernard Ingold⁵ in published articles have set out the background and history of the Rules of Professional Conduct for Army Lawyers, which were promulgated by TJAG in 1987. Credit must go to them for their research and analysis. I was not surprised to read that the impetus for consideration of these rules came from Colonel Bill Fulton, now clerk of the U.S. Army Court of Military Review. Colonel Fulton was Director of Academics during my term as Commandant, and this foresightedness is typical of him.

Military lawyers must bear in mind that they are also subject to the disciplinary rules of the jurisdiction in which they are licensed to practice.⁶ Obviously there will be occasions when the rules or the states' interpretation of them conflict or at least vary from Army Rules. Military lawyers could face a contradiction in appropriate action. Though the Army Rules state that the Army rules will supersede

²Officers Guide 2 (37th ed. 1973).

³R. Gabriel, *To Serve With Honor* (1982); M. Wakin, ed., *War, Morality and the Military Profession* (1979).

⁴Coupe, *Commanders, Staff Judge Advocates, and the Army Client*, *The Army Lawyer*, Nov. 1989, at 4.

⁵Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1 (1989).

⁶Dep't of Army, Pamphlet 27-26, *Legal Services—Rules of Professional Conduct for Lawyers*, Rule 8.5 Comment (Dec. 1987) [hereinafter *Army Rules*]; Model Rule 8.5 (1989).

those of the state, the state grievance board could well take a contrary view. At least The Judge Advocate General has not sought to immunize you from the Model Rules as the Attorney General recently sought to do for the Justice Department lawyers.⁷

Those who have studied and commented on the Army rules are generally pleased with the results of the Army effort and that the rules as developed face up to the unique problems of the military. They discard areas more specifically directed to lawyers in private practice and include matters of direct concern to lawyers in the military service.

There is all too often a tendency by lawyers to look to the rules, the codes, the canons, or the ethical considerations for specificity. Lawyers keep hoping somehow there will be a black letter code for the lawyer that, if followed, will *ipse dixit* make one ethical. The thought is that if one somehow manages to stay within the parameters of the written word then there is no problem in one's behavior. The rules are not law, but like the law the words do not fit each and every possible fact situation that may occur.

Professor Hazard, reporter for the Model Rules, has said that rules of ethics and law

should be seen as general principles of conduct, not a corpus of specific rules; as a group of principles that conflict with each other in many applications and extensions, not an internally consistent code; as qualified imperatives that always have to yield at some point to competing considerations; as resultants of encounters with tough practical choices in real life, not abstract mandates laid down in advance; as products of personal deliberation, not emanations from some outside authority; as the expression of self-fulfillment and self-control, not subordinancy to external discipline.⁸

Ethical rules are written by individuals who draw on their own experience (and their own draftsmanship). From that experience, committees and groups promulgate codes based on what in the end are their personal beliefs in a morality to fit the profession and in language not always totally clear. Even accepting the sincerity of the

⁷Attorney General of the United States, "Communications with Persons Represented by Counsel," June 8, 1989.

⁸G. Hazard, *Ethics in the Practice of Law* 4 (1978).

consideration that goes into the various codes, no set of rules can cover every set of facts. At best they can but illustrate principles by which the reader should act.

Individuals too often say, even those at high levels of government, when accused of ethical violations, that they "were within the law." This, in the field of ethics, is simply a cop-out. To follow the language of the law is not necessarily to carry out the spirit of the ethical principle that is to be followed. What is demanded in our ethical behavior is not sterile compliance with narrow rules, but acting within the spirit of the principles on which the rules are based. This is not to denigrate the codifications that have grown up through the years, a recent example of which are those rules drafted for members of the Corps. But one must be willing to acknowledge that ethical problems arise out of fact situations for which there may be no exact rule or law and for which the drafter had no concept. There are nuances that may change the ethical spirit of one's actions. The judge advocate is called upon to become familiar with the rules and to analyze and understand the reasons behind the rules in order to act properly when faced with new and unique ethical situations.

This being so, it would be ridiculous and redundant for this article to merely repeat the rules. It would be dull as dishwater; it would not be long remembered; and finally, there are far better methods of becoming familiar with the rules of professional responsibility. Members of the Corps have studied the rules in far greater depth than called for in this article.

III. PROFESSIONAL IRRESPONSIBILITY IN GENERAL

First, one should determine why individuals are professionally irresponsible. Why do those admitted to the practice of law and those who are commissioned as officers of the United States not perform their duties and functions ethically? My study indicates that the reasons may be subsumed under five rubrics for which I have an acronym:

A - E - I - O - U

A stands for ambition, which comes in many forms. Professor Flammer cites example after example of the effect of "careerism syndrome" on ethical performance. He quotes General Von Hoffman, who said, "The race for power and personal positions seems to destroy all men's character." And Lidell Hart is quoted as lamenting

the “growing obsession with personal career ambition.”⁹ It was during and after the Vietnam period that so much was heard and read of careerism in the American military and the steps officers took to be sure each had touched all the proper bases and pushed all the right buttons (it was called ticket punching).

It may be easy to recognize those reaching for the “stars,” but there are those whose ambition may be in smaller things: to win a court verdict; to turn in more opinions than any other in the branch; to have an assignment that is plush; to have one’s own lecture published. All have their own ambitions. It is important to recognize when ambitions become so overwhelming that the standard of behavior is overcome and the principles of ethical conduct are ignored.

E stands for emotion, which has two facets. First, there is provocation. Litigators especially need to be reminded that there is no tit-for-tat rule. It is easy to become provoked by an adversary in the courtroom. It is equally possible to be provoked by an opponent across the negotiating table, by the unfairness of an efficiency report, by the nit-picking of a superior, or even by an associate on a brief or paper. Provocations can cause some people to seek shortcuts, to manhandle the fact situation, to strike back, or even to misconstrue the law.

The second prong of the emotional cause for misconduct is the reaction of lawyers arising out of personal acquaintance with the parties and knowledge of the facts. This creates an undue concern for the outcome of the case or legal problem. This is especially so for defense counsel who become concerned for the defendant; for the prosecutor who gets emotionally involved in a child abuse or sexual assault case; for the legal assistance advisor who seeks to help a soldier evicted from his home or a dependent who needs legal help while a spouse is overseas. There are examples of those lawyers who become over-excited in the courtroom, who improperly pressure landlords or business firms with threats of off-limits actions, who raise biased and prejudicial arguments in court, or who attempt to intimidate a soldier’s spouse to secure a settlement.

Military lawyers maintain constant relationships with commanders and staff officers; and they must be aware that non-lawyers, too, become emotionally involved in legal matters. In fact, the lay officer may become more emotionally concerned in a case than the attorney,

⁹Flammer, *Conflicting Loyalties and the American Military Ethic*, in M. Wakin, *supra* note 1.

and it will be the role of the attorney to maintain an objective stance. An attorney repeatedly addresses the personal problems of others and should be able to remain uninvolved; a layman will seldom have occasion to become involved in the personal legal relationships of others.

Shortly after the end of American direct involvement in Vietnam, while emotions were still at a high pitch among both military and civilians in the United States, there was a publicized criminal proceeding alleging a mutiny that resulted in much adverse publicity for the Army and the Judge Advocate Generals Corps. At the conclusion of this affair, the three star general who was the convening authority was invited to speak to the Advanced Class of The Judge Advocate General's School to discuss his views of the case. The author was acquainted with this outstanding military leader, as well as with the officers who served as his staff judge advocate and chief of military justice in the command. It was unfortunate that these three officers were all assigned at the same time at the same place; all three had become emotionally involved and it was a disaster asking to occur. Had any one of these outstanding individuals not been in position, perhaps more objectivity would have prevailed and the Army would have been spared unfortunate publicity. The officers might have been spared much trauma as well.

I stands both for ignorance and incompetence. For a lawyer to commit an unethical act and to excuse the act on the ground of "I didn't know it was wrong" reminds one of the excuses one hears from political figures.

It must be acknowledged that law schools and the profession really do a poor job of teaching professional responsibility. Most law schools have not learned how to teach the subject of ethics and until recent years have not really cared. The mandatory CLE states have made some effort, but it has been more cosmetic than substantial and ethics credits are given freely for attendance at seminars.

Some of the fault can be laid on the Codes or Rules themselves, which have been less than clear. Much of what was written was aspirational and failed to provide real guidance. Too much ink was wasted in discussing the issues of advertising and control of trust funds. These are issues of little interest to government attorneys, including the military.

Incompetence may be the greatest single sin of lawyers. The very

first rule¹⁰ speaks to the question of competence and adjures each lawyer to use legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.

The profession need not be as concerned about legal ability as it should be about the failure of many lawyers to perform for their clients in a workmanlike manner. Records are replete with evidence of lawyers who fail to prepare or who fail to investigate the facts or the law, who miss filing dates, who refuse to Shepardize the law, or who are really not abreast of current law and legal developments. Most lawyers observe the language of Rule 1.1 on competence, making sure that they know enough about the law to serve a client or to find someone who does; the unethical ones are those lawyers who, though legally competent, fail to perform because of laziness or indifference.

Judge Quinn in his concurring opinion in *United States v. McFarlane*¹¹ said, “defense counsel here conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had.” Hopefully there are few lawyers within the military establishment about whom this could be said in 1990.

A lawyer’s duty is to the client and to the public; to fail to perform, as some lawyers (and some judges) do out of concern for personal comfort, is unconscionable.

O stands for the sin of overkill. It seems unlikely and almost inconceivable that a lawyer would commit an act of professional irresponsibility by doing too much when most do too little. Unfortunately, this is often the case in the courtroom where a prosecutor, having presented the case and winning easily, cannot resist pounding one more nail into the coffin. This is done by attacking witnesses, by denigrating opposing counsel, or by resorting to matters of bias and prejudice to make certain of a win. This sin of overkill comes in part from emotion and ambition but also as a result of thoughtlessness and not knowing when enough is enough.

There is always an Abraham Lincoln story to illustrate any point. It is said that on one occasion he was walking with a friend when they came upon a man beating a dead dog with a club. Mr. Lincoln remonstrated with the fellow and asked if he did not know the dog was already dead. The fellow replied, “Yes, I know, but I believe in

¹⁰Model Rule 1.1.

¹¹*United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957).

punishment after death.” Sometimes lawyers are observed in court who seem to follow this same principle in presentation of a case.

Finally, *U stands for those lawyers who are simply unethical*. Fortunately, there are few of these in the profession and even fewer in the Corps. These few individuals seem never to have developed a personal code of behavior or morality that should be expected as the hallmark of all who call themselves lawyers.

In this connection I recall an incident involving a young captain who appeared before Colonel Paul Tobin, the military judge. The young man had admitted in court that he had altered the date on a check he submitted in extenuation for his defendant. Judge Tobin called him to the bench and said, “Young man, I understand that you are about to leave for Vietnam. I suggest that you take a slow boat and take the time to thoroughly read the Canons of Ethics.”

IV. THE EFFECTS OF PROFESSIONAL IRRESPONSIBILITY

All attorneys, especially those in uniform, are advised to recall the statement of Solicitor General William Frierson, who said,

In such a profession there is no room for fellowship with the dishonest, the unfaithful, the untrustworthy or the unpatriotic, and no useful place for those who are ignorant or inadequately prepared. It is our duty to the public, to the government and to ourselves to guard jealously professional standards and ideals, and to see that they are kept high and clear.¹²

When individuals for whatever reason commit acts of professional misconduct or engage in unethical activities, this can have long range effects on the individual, the office and the client.

The Army Rules make very clear that the client of an Army lawyer is the Department of the Army acting through authorized officials. The exception covers those situations when the military lawyer is serving as defense counsel or in a legal assistance capacity.¹³ It goes without saying that when a member of the Judge Advocate General's

¹²Frierson, Address to the 5th Session Conference on Legal Education, 1922, *reprinted in* 8 A.B.A. J. 1565 (1922).

¹³Coupe, *supra* note 4.

Corps serves as defense counsel, government prosecutor, or legal assistance counsel, the cost of misconduct to the client is quite apparent.

When the Department of the Army is the client, the attorney may be serving in one of several capacities: in an advisory or consultative role; as a negotiator; or in an advocacy role. In any of these roles, the client will suffer when the lawyer performs irresponsibly. The actions may result in wrong advice, insufficient assistance, or a loss or defeat in the courtroom, the board room, or across the negotiating table. It is unfortunate but true that in some of these capacities the cost of professional irresponsibility may not always be readily noticeable.

Situations will develop when clients learn or suspect that a lawyer is operating in an unprofessional manner. This impression quickly spreads throughout an office or agency or even throughout an entire military installation. When this happens, there occurs a loss of faith not only as to that particular attorney, but also in the entire office and all the lawyers of that office. The old cliché about the bad apple in the barrel applies perceptively also to a judge advocate office. Court members, commanders, staff officers, legal assistance clients, and accused become wary of the advice and assistance they are provided from any lawyer in the organization or agency.

There has been a growing tendency in recent years to disqualify entire offices for the possibilities of conflict arising about one lawyer in an office. This has been expanded to situations where courts recuse entire offices for the threat of unprofessional conduct by one member. Such disqualification is not limited to private law firms, but also includes government legal offices.¹⁴ Both the offices of prosecutors and of public defenders have been subject to such rulings. There is no reason to expect that the courts might not apply these principles to legal offices within the military establishment. It would be hoped that the disqualification would never extend throughout the Corps, though such an order may not be beyond the fertile imagination of some members of the judiciary.

In the early 1970's the military justice system and the **Corps** became suspect. Criticism of the system was widespread, and the controversy

¹⁴People v. Johnson, 409 N.W.2d 784 (Mich. Ct. App. 1987); People v. Doyle, 406 N.W.2d 893 (Mich. Ct. App. 1987).

was aired by the courts,¹⁵ in books¹⁶, and in the media in general. Bar organizations were critical, as were many members of Congress. This distrust of the management of the system permeated the service; officers and enlisted personnel claimed to have little assurance of justice. As a result the system was of limited assistance to the Army at a time when discipline was already at a low ebb.

History should not be misread to make one think that unprofessionalism was the cause for this distrust, although it did play a part. Distrust fed on low morale in the Corps, and the low morale led to ineffective and careless acts. It was clear that a counter action was required and that the Army needed to take remedial action on its own before the problem was removed from its authority by outside forces.

Major General George Prugh, The Judge Advocate General, gave the School the responsibility of coming forward with a program to re-establish the credibility of the system in the eyes of the Army in general. This operation was entitled "Crisis in Credibility." The entire faculty and staff were mobilized to develop programs to accomplish this important mission. The goal was to convince the Army as a whole and incidentally the American public that military lawyers and military law met the highest standards expected of the criminal justice system and of the lawyers who were responsible for operation of the system.

As has been typical of the JAG School, the staff attacked the problem with vigor, imagination, and determination. From their efforts came a series of books, pamphlets, and even a cartoon book illustrating the criminal justice system. Special attention was paid to senior NCO's and senior commanders. From the "Crisis in Credibility" emerged the SOLO course (Senior Officers Legal Orientation), designed to explain fully to commanders at battalion level and above the legal problems faced by every commander. These programs helped to re-establish the professionalism of the Corps in the eyes of the Army from private to general officer. Moreover, they helped to revitalize the professionalism within the Corps. The Corps once again began to stand tall. This was the beginning of an entirely new look for lawyers in the Army and an extension of the legal activities practiced far beyond the field of criminal law and discipline.

¹⁵"None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969) (quoting Glasser, *Justice and Captain Levy*, 12 *Columbia Forum* 46, 49 (1969)).

¹⁶R. Sherill, *Military Justice is to Justice as Military Music is to Music* (1970).

As significant as an unethical performance may be on the client, it can be even more devastating and have greater implications for the attorney. When others become aware of the misconduct or the shading of action, the credibility of that lawyer is thereafter suspect. One must hoard and never squander personal credibility, for this is the stock in trade of the individual who seeks to practice law.

Depending to some extent on the status and concern of one's superior, improper ethical action can result in a variety of unfavorable and unpleasant reactions. These may vary from oral or written reprimands of varying intensity to a change of assignment or an official report, including an unfavorable efficiency report. In reference to the young officer described above who was reprimanded by the military judge, it should be added that his efficiency report included a statement that he should never be tendered a regular or reserve commission. In fact, the officer did seek to remain in the Reserves and this efficiency report was effective in denying him that opportunity.

What is, of course, most disastrous for any lawyer is disciplinary action that affects the right to practice law. It is enough that a lawyer is privately reprimanded, even worse to be publicly reprimanded. These punishments hurt not only the lawyer's ego, but also the lawyer's career. Public knowledge of the reprimand can rise to haunt the individual in relationships with other lawyers and with clients. More disastrous are suspensions and disbarments. Such procedures can be applied to military lawyers as well as civilian practitioners. It is well for those in uniform to be reminded that there is a life after JAG.

V. SPECIFIC TROUBLESOME ISSUES

There are several areas of behavior relating to professional conduct that are worthy of special attention. Within the military service the relationship of subordinate to superior is always believed to be a special problem. There exists a recurring myth in military circles, and even more so among civilians unacquainted with military policy, that the chain of command system is somehow uniquely chilling on the independence of subordinates. This is believed, for reasons unknown, to be especially true for military lawyers. The idea has been often expressed that a line colonel or a general officer, either as a convening authority or commander, has such power that any attorney in uniform automatically cringes and is somehow reduced to jello, becomes unwilling to speak, and is unable to offer an independent reasoned legal opinion. The truth is that military lawyers

should be no more constrained by rank than are associates and staff attorneys in law firms or the offices of general counsels. Those attorneys are disquieted by the power of senior partners, of CEO's, and of Board Chairmen. Salaries, bonuses, promotions, and partnerships are as important to those in civilian clothes as brilliant efficiency reports are to uniformed attorneys.

It is a myth that judge advocates are particularly apprehensive about senior line officers, but it is more likely the case that they are fearful of the authority of older and more senior military lawyers. The influence of a staff judge advocate may be far more intimidating to a junior member of the Corps than that of a general officer, who has little if any knowledge of the law and who is likely to rely totally on the advice of a young lieutenant shortly out of law school. An older judge advocate will say that he has "forgotten more law" than the youngster yet knows. Granted, some seniors have forgotten a lot of law, but this is no reason to be intimidated.

Experience dictates that there is nothing more disturbing and chilling to a judge advocate serving in the field than to receive a call from the Pentagon, whether it be from The Judge Advocate General (a highly unlikely caller) or from an underling from the inner ring of that famous building. Any call from Washington is disconcerting and usually is accompanied by a sense of urgency transmitted through the lines. Such calls can be finessed in an office interview with even the most senior of the post or command officials, but hardly over the long distance wire.

If in fact there is a genuine concern for "command influence" exercised by senior legal officials, it is well to look at the Model Rules,¹⁷ which now for the first time along with the Army Rules¹⁸ impose liability on supervisors for violations of the rules of conduct committed by subordinates when the superior orders or ratifies the wrongful conduct. There is as yet very little precedent for the application of this philosophy, and as yet it is not clear whether the fact that the supervising attorney "should have known" of the misconduct will be sufficient to justify a discipline of the senior. There may come a time when the rules will be interpreted to require a supervisor to become so involved with the work of subordinates that any misconduct of the subordinate is imputed to the superior. This may arise out of a failure to instruct or to oversee the activities of

¹⁷Model Rule 5.1

¹⁸Army Rule 5.1

subordinates. The subordinate can take little comfort from this rule, for the subordinate will also be subject to discipline for violations. There is no Nuremberg **defense**.¹⁹

The disputes with non-lawyer senior commanders seldom involve questions of professional judgment, but usually relate to matters of office policy or working conditions. In the “old days” most disputes arose when commanders sought to impose military duties on lawyers (for which most were unsuited or at least believed they were).

Elihu Root, one of America’s great lawyers at the turn of the century, told of the cry of clients, “don’t tell me what I cannot do, tell me how I can do it.” This plaintive cry is still heard from commanders who become frustrated with lawyers and their legalisms. An ancient saying provides, “though clients sometimes are more pleased with having their views confirmed by an erroneous opinion than their wishes thwarted by a good one, yet such mentation is dishonest and unprofessional.” How the military lawyer handles this problem can well become a question of ethics if the lawyer’s answer is to find what he terms an available loophole that nevertheless is contrary to the spirit of the law. Unfortunately, it is the nature of many attorneys to be negative. Though not strictly an ethical issue, lawyers might be well advised to think positively when dealing with superiors and clients in general. A positive attitude would serve lawyers well.

A current matter of ethical concern is what has been termed the Rambo theory of litigation, and it hardly seems likely that military lawyers are immune to this terrible virus. The Rambo approach to the practice of law is to ride rough shod over witnesses, opposing counsel, and, if possible, the judiciary. One judge said recently, “Zealous advocacy is the modern day plague which infects and weakens the truth finding process.”²⁰ One is well advised to bear in mind that twelve hours a day of bile is not good on the health and that most people recognize that hardball begets hardball. Do not misread me: this is not a call for wimpiness. One can be zealous without being unpleasant.

The matter has become so endemic that our courts and senior judges have become greatly concerned. The fifty thousand lawyers of Texas received from the Texas Supreme Court a Lawyers Creed—A Mandate for Professionalism. The Houston Bar Association sent

¹⁹Model Rule 5.2; Army Rule 5.2.

²⁰Hanna v. Natl. Bk. and Trust Co. of Chicago, No. 87CH 4561 (Cir. Ct. Cook County 1988), *rev’d*, 531 N.E.2d 961 (Ill. App. Ct. 1988).

an illustrated copy of the Mandate to each member for framing, asking that lawyers eliminate the term “Rambo” from their vocabulary. The Mandate calls for candor, courtesy, and respect for clients, counsel, and the courts.²¹

What is and apparently will continue to be a problem area is the relationship of members of the bar with the media. I hope this is of lesser concern to military lawyers. Concern for fair trial versus a free press remains an arena for conflict. The rules for communication by the bar with the media are quite clearly set out in the Code,²² Rules,²³ and Standards.²⁴ Notwithstanding, the profession seems prone to violate the law and spirit all too often. The errors can often be put at the door of members of the media, who are not governed by a similar standard of conduct and who, by their insistence, encourage ethical violations by attorneys—albeit unknowingly. Unfortunately, few are able to resist the temptation to appear in a fifteen second bite on the tube or to see their names in print. Though frowned upon as a violation of the freedom of the press, most lawyers, when in doubt, might do well to follow the simple axiom—Shut *Up*.

When I was Commandant, it was my practice to address each basic class on what I considered standards of conduct for newly commissioned judge advocates. Among the subjects I covered in those lectures was a reminder that much of what we do as lawyers involves a confidential relationship. This reference was not to be confused with security classifications but what is learned from clients or witnesses or from investigations. This matter continues to be of special concern to lawyers in or out of uniform.

There was an old World War II saying that “loose lips sink ships.” Talkative attorneys may not sink ships, but often they can violate the confidentiality of their relationships and consequently violate the privacy of those with whom they deal. The obvious cases involve judge advocates performing as legal assistance advisors or defense counsel, but the problem is far deeper and far more complex. The problem involves relationships with defendants and witnesses, with office policy or personnel matters, and with a myriad of other pieces of information that are not for an attorney to make public. Too often the release of information is believed to involve only interviews with the media or publications. Breaches of confidentiality go far beyond

²¹Cook, *The Search For Professionalism*, 52 Tex. Bar Journal 1302 (1986).

²²Model Code of Professional Responsibility, DR 7-107 (1989).

²³Model Rule 3.6.

²⁴ABA Criminal Justice Standards, chapter 8.

the legal questions involving free press and free speech. Breaches arise inadvertently as well as deliberately when they occur during discussions of legal matters either within the legal community or outside of it.

Such discussions come about when a lawyer seeks the assistance of another on a legal problem and sets out a fact situation or when an attorney talks at home with the family without reminding them of the nature of the profession. It also may arise inadvertently on social occasions when a good story seems appropriate. These are but examples of instances when the hearer has less than a need to know. Court members, convening authorities, witnesses, board members, and the families of legal assistance clients also go to the club and to the church.

It is important for lawyers to bear in mind that they also have a responsibility to restrain the release of information by office personnel who may not be covered by the rules of professional conduct. Breaches by non-lawyers who work for lawyers can be as disastrous as the indiscretions of lawyers. The Rules impose a special responsibility on prosecutors for insuring that persons assisting the prosecutor in a criminal case observe the same rules on release of information that the prosecutor observes.²⁵ It behooves us all to ensure that typists, paralegals, or any other assistants understand the importance of maintaining privacy of the files and discussions overheard in the office.

VI. A PERSONAL CODE OF MORALITY

An attorney may give intensive study to the codes and rules and standards. Many hours may be devoted to ethical training and education in professional responsibility. But in the end a personal code of morality and decency is the most perfect answer to performing in the highest standard of the profession. The personal code will enable the lawyer to decide on an ethical stance to take when faced with a question of action to be taken.

Certainly a major pillar in building a personal code for a member of the Corps is Duty. Duty is directed to the United States, to the client, and to the profession. Perhaps Abraham Lincoln put it best and succinctly, "I do the best I know how, the very best I can do." This statement applies to every profession and especially to those in the military and in the law.

²⁵Model Rule 3.8(e).

Part of the code is loyalty; loyalty should be directed to the nation, to the Army, to the Corps, and to one's superiors within the limitations of integrity and honor. Words to live by for the military lawyer are still those of General George Marshall, who said that an officer's ultimate and commanding loyalty at all times is to his country and not to his service or to his superior. However, it should be remembered that loyalty includes that due to those who work for us. Loyalty is in giving and receiving. There is a "ying" and "yang" of loyalty that is a touchstone of relations with subordinates.

To conform to a personal code, ultimately one must have courage. Judge William Sessions, Director of the FBI, in an address to the University of Michigan Law School, said that the most important requirement for any attorney is courage.²⁶ Courage includes standing before the desk of a senior general officer or a presidential appointee and giving a legal opinion frankly and honestly, albeit with knees knocking. Courage includes a willingness to attempt new legal measures believed to be valid but as yet untried. Only a few short years ago, lawyers were afraid of arguing uncharged misconduct—arguing that the concept was unethical. In effect these attorneys were restrained by fear of being wrong. Today there is an apparent unwillingness to use imaginative demonstrative evidence for fear it will not fly.

Obviously, all that has been discussed is of little moment if the individual who seeks to perform within the ethical and moral code of his profession does not have the courage to follow what is known to be right. Knowing the rules and understanding the spirit of the code is for nought if one is unwilling to stand up and act within those rules.

Ethics and professional responsibility demand that those in the profession not only refrain from doing wrong, but also that they positively perform. One has to be willing to do as Ken Hodson and others have done by giving of personal time and effort to improve the system. There must be a willingness to perform pro bono service for those in need of legal advice and advocacy. Talents must be used for those in need without regard to personal convenience. Military lawyers tend not to utilize the unusual opportunity they have to reform the law.

Finally it is the responsibility of every one who is called attorney to be willing to stand up for the rules and to report violations of those

²⁶University of Michigan School of Law, Law Quandrangle Notes, Summer 1989.

who do not observe the code of professional conduct. Maintenance of discipline must not be left solely to the members of the judiciary, to senior lawyers, nor to The Judge Advocate General. It is the responsibility of each member of the Corps. This does not mean to be a tattler, but to be willing to document the ethical errors of associates who contaminate the system. Each is responsible for maintaining the ideals of the profession.

As officers of the Army, as military lawyers, you have the luxury to be right and to do to justice. You have no client who may seek to fill your mind with bad ideas because he pays you.

The words of Justice Jackson, speaking to a group of United States attorneys in 1940, apply today to military lawyers:

The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called “the shadow cast by one’s daily life.” Any (prosecutor) who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character.²⁷

²⁷Address delivered by Robert H. Jackson, Second Annual conference of United States Attorneys (April 1, 1940).

CHINESE MILITARY LAW A BRIEF COMMENTARY ON CAPTAIN RODEARMEL'S ARTICLE

by General Zhang Chi Sun*

I. INTRODUCTION

The article *Military Law in Communist China: Development, Structure and Function*, by Captain David C. Rodearmel, appeared in volume 119, *Military Law Review* (Winter 1988). This article is, so far as I have ever read, surely valuable, although the subject is a tough thesis to be worked out by a Westerner. No foreign scholar in this field has achieved such a depth as Captain Rodearmel has achieved. The primary problem in studying China's military law is, perhaps, the acute lack of information available either inside or outside of China. Nevertheless, Captain Rodearmel collected hundreds of pieces of material from every possible source to build his thesis upon steady and strict foundations. His article covers a wide range of various issues in China's military law, and affirmatively is an informative, objective, and scientific work as a whole. It helps western scholars to understand the military law of People's Republic of China (PRC) systematically, contributes much to the research of comparative military laws of the world, and promotes in some respects the friendly relationship between our two great countries, as well as their armed forces. Finally, it gives us, Chinese readers, an outline for learning what and how much foreign specialists know in this field.

As Captain Rodearmel notes in his article, several difficulties exist in the research of the military legal system of the PRC. It is thus

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no wonder that the author would make some errors in his paper, some of which are misunderstandings; some statements are disputable, and some facts quoted by the author are questionable. All of this, however, can be attributed to the shortage of information and researchers in this field. For the purpose of expanding this area of military legal research, some brief additions and revisions made by a Chinese veteran of military law may be appropriate.

II. THE DEFINITION OF MILITARY LAW

The article cited a definition of military discipline in China from "the authoritative Chinese military dictionary *Ci Hai*."¹ The author here adopted the quotation from *A Comparative English-Chinese Dictionary of Military Terms* (R. Dolan, U.S. Defense Intelligence Agency, 1981). This is, however, an incomplete explanation. First, *Ci Hai* (Word-Ocean Dictionary) is not a military dictionary; and second, the U.S. dictionary defines only the term for "military discipline," rather than for "military law." There is no definition for the term "military law" in *Ci Hai* at all. Perhaps the reason for this absence is that the authoritative explanation of military law has not yet been made. A symposium held by the People's Liberation Army (PLA) Military Academy in mid-summer 1988 was aimed at discussing the definition of military law. The author of this commentary attended the meeting, but no conclusion was reached. A draft manuscript of "The Military Encyclopedia of China" defines the term "military law" as follows:

Military Law is a branch of laws, enacted, authorized, and enforced by the nation. It integrates a specific legal system, which includes the legislation and amendment of military laws and acts by the National People's Congress; the promulgation of military ordinances and rules by the State Council and the Central Military Commission; and the enactment of military regulations and directives by executive organs of the central government and by the military general departments. All of these laws, rules, regulations, and directives must be based upon the Constitution of China, and are mainly concerned with matters of national defense and the operation of war.

In my opinion, many questions remain unresolved by this definition. It is still far from satisfactory.

¹Rodarmel, *Military Law in Communist China: Development, Structure and Function*, 119 Mil. L. Rev. 1, 2 (1988)

111. THE RELATIONSHIP BETWEEN TRADITIONAL CHINESE LEGAL CONCEPTS AND CURRENT CHINESE MILITARY LAW

Military laws in various countries, as a cultural heritage in their own right, derive their concepts from different historical backgrounds. One can trace contemporary Chinese military law to Confucianism, to Sun Tzu's *The Art of War*, and to Marxist-Leninist concepts of law. This is just as natural as the fact that one can trace the United States' Uniform Code of Military Justice back to the American Articles of War of 1775 and to England's Mutiny Act of 1689. All military legal heritages have developed divergent characteristics, and China's military legal system has its own characteristics. Some of them are illustrated in Captain Rodearmel's article, but others are not. Among those that Captain Rodearmel neglected is that the PLA has emphasized the concept of indoctrination and political education of service members much more than that of punishments, either disciplinary or penal. The Chinese proverb of "learn from past mistakes to avoid future ones, and cure the illness to save the patient" is well known and accepted by each level of commanders and judges.

There are strict differentiations between the measures adopted in accordance with military discipline and those pursuant to military law. Article 2 of the "Provisional Regulations of the PRC on Punishing Servicemen Who Commit Offenses Against Their Duties" states: "Any act of an active duty PLA serviceman that infringes on his duties and endangers the State's military interests and is punishable by law is considered a serviceman's offense against his duties." That is to say, unless all these requirements are met, the accused will never be punished in accordance with military law. Article 2 concludes by stating that "in cases of markedly mild offenses and when not too much harm has been caused, the act is not considered an offense and will be dealt with in accordance with military discipline." This clearly states that punishment under military discipline does not equate with punishment under military law.

One does not find the same differentiation in the United States. Some offenses, disrespect toward a superior commissioned officer, for example, are offenses punishable under the Uniform Code of Military Justice, but which usually merit nonjudicial punishment. Nevertheless, this offense is assuredly a violation of U.S. military law. In China, however, this is not an offense in the sense of the Chinese concept of military law, and is thus not subject to either judicial or nonjudicial punishment. Rather, this is a breach of military discipline,

regulated by discipline and not by “law.” Disrespect would become an offense in a case where the accused not only was disrespectful toward the superior commissioned officer, but also resorted to violence or threat to obstruct the superior in the performance of his duty. This would never be disposed of by nonjudicial means under China’s military law; it would become a court-martial. Therefore, I do not think it is precise to classify the process of China’s military law and discipline into judicial and nonjudicial punishment categories as Captain Rodearmel does in his article, although that is quite right in the U.S. military system.

One thus finds that only a surprisingly limited number of servicemen who commit breaches of military discipline will be tried before courts-martial. Most of them are dealt with by disciplinary punishment or by education and criticism handled by both commanders and political commissars. There are no more than one thousand cases per year handled by the military courts of the PLA. That is indeed a small ratio of judicial cases for an armed force of three million!

IV. THE STRUCTURE AND FUNCTION OF THE MILITARY LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA

Because information in English concerning the military legal system is rarely revealed from mainland China, it is not surprising that so many narrative errors relating to the structure and function of military courts and procuracies exist in Captain Rodearmel’s article. The military courts and military procuracies of the PRC are authorized by the Constitution as an integral part of the State judicial system. They are organized under The Organic Law of the People’s Courts and The Organic Law of the People’s Procuratorates, and are defined as Special People’s Courts and Special People’s Procuracies, attached to the armed forces. The Organic Laws state that the functional and organizational details of the military courts and procuratorates will be prescribed by separate enactments of the Standing Committee of the National People’s Congress; but these have not yet been enacted, nor even drafted. This is the only reason why these laws have not been published, rather than being classified under military secrets regulations as Captain Rodearmel states.²

²*Id.* at 54

The Military Court of the People's Liberation Army is the highest military court. The rank of the President of the Military Court of the PLA corresponds to the Vice President of the Supreme People's Court, and that of the Chief Procurator corresponds to the Deputy Chief of the Supreme People's Procuratorate. The President of the Military Court of the PLA is named by the Standing Committee of the National People's Congress. At least two presidents have been named since Tian Jia (whom Captain Rodearmel mentioned in his article) held this post; this is also true of Yu Kefa, the former Chief Procurator.

Military courts and procuracies exist at three levels: 1) the PLA level, the highest level; 2) the higher level courts and procuracies, which exist for military regions, for each armed service within the PLA (including the navy and air force) and for each general department (unified staff, political, and logistical departments supporting all branches of the PLA); and 3) the primary level courts and procuracies at the military provincial district level (also at navy fleets, air force regions, and missile bases). These are not extended down to regimental echelons, as Captain Rodearmel indicated.³ The military judges and procurators are named, except for the President of the Military Court of the PLA and the Chief Procurator of the PLA, by either the Central Military Commission or by different levels of military authorities, according to their respective ranks. They are never named by the Ministry of Defense, as Captain Rodearmel reported.⁴

The operation of the military courts is summarized by the term: "courts of three levels and trials of two instances." The three levels of military courts are: 1) the highest level, the Military Court of the PLA, which has jurisdiction over cases in which the accused is a commander of high rank (at least division commander or senior colonel). It also reviews cases appealed by the defendant or procurator from the courts of higher level, as well as any serviceman's sentence of capital punishment, whether appealed or not; 2) the higher level courts (military region, armed service, and general department), which have jurisdiction over all cases in which the accused is of a rank of divisional vice-commander or colonel and lower, and which review cases appealed by the defendant or procurator from the primary level courts; and 3) the primary level courts (military provincial districts, navy fleets, air force regions, and missile bases),

³*Id.* at 55.

⁴*Id.*

which have jurisdiction over all cases in which the accused is of a rank of battalion commander or senior captain and lower, to include soldiers and civilian employees of the armed forces.

The two instances of trial are: 1) the trial of the first instance, held at the court of the appropriate level according either to the rank of the accused or to the importance of the case; and 2) the trial of the second instance, which takes place at the next higher level court to the trial of the first instance, reviews the lower court's decision, and takes final action on the case. The accused in cases of first instance tried by the Military Court of the PLA may appeal to the Supreme People's Court.

Sentences to imprisonment are not served solely in military prisons. Those criminals whose sentences include dismissal from military status usually serve their terms in local prisons.

It is a fact that the system of military courts and procuracies was "dismantled," though not formally abolished, during the Cultural Revolution. However, serious military cases were handled by military security organs in the name of military courts, and not by "revolutionary committees" nor by Party organs, as Captain Rodearmel relates.⁵ Moreover, the military legal system could not extend its authority to civilians during the Cultural Revolution because the military courts and procuracies had been wholly dismantled and military legal officers were all exiled by that time. The cases Captain Rodearmel cites were neither handled by courts-martial nor tried under military laws; they were in fact tried by *Kung-Chien-Fa* (public security police, procuratorate, and people's courts) in accordance with Party policy under the leadership of military control committees (later the revolutionary committees) headed by the extreme leftists during the Cultural Revolution. There are significant differentiations between the extension of military jurisdiction over civilians and the control of civilian authority by a few uniformed leftists. The situation was wholly abnormal, absurd, and unconstitutional.

Pending the drafting and enactment of the Military Judicial Procedure Law in the early 1990's, every step in military adjudication follows the process set forth by the Criminal Procedure Law of the PRC. No separate characteristics of the military judicial process can be found, as one finds in the Uniform Code of Military Justice and in the Manual for Courts-Martial of the United States. Thus, there is nothing worthy of being reported. This is why Captain Rodearmel

⁵*Id.* at 47.

complains in his article that English language reports of actual cases and the procedures employed therein are very rare. (This is also true of Chinese reports, for that matter.)

V. SOME REVISIONS AND ADDITIONS

The following quotations from Captain Rodarmel's article are of questionable validity; the subsequent sentences are revisions or supplements suggested by the author of this commentary.

1. "There was little differentiation between civilian and military law in the imperial system. No specialized military courts or tribunals existed."⁶ There were in fact considerable differences between civilian and military law in the imperial system. Neither civilian courts nor specialized military courts or tribunals existed.

2. "In 1927 Mao wrote of the need for excesses, even terror, to break the hold of tradition by revolutionary action."⁷ I would substitute the word "violence" for "terror" here. I do not believe the word "terror" here is precisely expressed in its original meaning, especially in view of the present connotation of the word "terrorism."

3. "The first rudimentary rules of discipline for the Red Army were formulated by Mao in the spring of 1928."⁸ In fact, these were formulated in October 1927.

4. "Six 'points for attention' were developed in the summer of 1928."⁹ These were developed in January 1928.

5. "Red Army military tribunals were formalized on 1 February 1932 when the Central Executive Committee of the CSR promulgated the 'Provisional Organizational Regulations for Military Courts of the Chinese Soviet Republic.' These regulations, although in force for only a short period, established models for the Chinese Communist military legal system that have continued, in many respects, to the present day."¹⁰ Actually, Red Army military tribunals were formalized preliminarily a half year earlier on 1 September 1931, when the Executive Committee of the Hubei-Henan-Anhuai Soviet Region promulgated its "Provisional Organizational Regulations for Military Courts."

⁶*Id.* at 7.

⁷*Id.* at 11.

⁸*Id.* at 16.

⁹*Id.*

¹⁰*Id.* at 20

6. "The 1951 case had cited as its source of jurisdiction Article 20 of the statute on punishing counter-revolutionaries, which permitted civilians to be tried by military tribunals while military control committees were administering the civil government. As military administration was no longer in effect in 1954, the jurisdictional basis for these cases is unclear."¹¹ While the jurisdictional basis for these cases was unreported, it may be assumed that jurisdiction was based on the ruling made by the Supreme People's Court that in any case the laws should be applied retroactively to the time the offense occurred.

7. "The military procuracy officially resumed operations on 25 January 1979."¹² Actually, the military procuracy officially resumed operations effective the same date that the PLA military courts were officially revived, 20 October 1978.

8. "The PLA issued its own implementing regulations on state and military secrets in 1956, and again in 1978."¹³ A new version was introduced in 1986.

9. An additional paragraph should be added to the PLA Military Secrets Regulation:¹⁴ "10. Never carry secret videotapes, recording tapes, or any other media carriers to public places or to visit relatives and friends."

10. "Death sentences are to be reviewed by the Supreme People's Court, whether appealed or not."¹⁵ This provision of the criminal Procedure Law has been revised by a decree of the Standing Committee of the National People's Congress, which authorizes review of most death sentences by the Military Court of the PLA, whether appealed or not.

11. "As the military procuracy had not yet been restored, the case was investigated by a special Party study group."¹⁶ In fact, the military procuracy had been restored by that time.

Many other questions might be raised, but it is better to draw near to a conclusion in such a short commentary.

¹¹*Id.* at 40-41.

¹²*Id.* at 51.

¹³*Id.* at 62.

¹⁴*Id.*

¹⁵*Id.* at 67.

¹⁶*Id.* at 68-69

VI. PROGRESS AND PROBLEMS

It is doubtless true that all of the progress and problems of China's military legal system today could not be fully described in Captain Rodarmel's article. The progress of the Chinese military legal system has apparently achieved a new stage since senior leader Deng Xiaoping urged the strengthening of socialist legality. Yang Shangkun, the President of the People's Republic of China, has also pledged "ruling the armed forces by laws."

The attainments of military legality in China during recent years have been well recognized. Among the most significant developments are: 1) the establishment of the Military Legal Administration under the direct leadership of the Central Military Commission, which is playing a more and more important role in Chinese military legality; 2) the establishment of Counsel Chambers and law advisers, which provide legal assistance for military units as well as for service members; 3) the recruiting of many well-educated young legal officers from the law schools. Even post-graduate candidates for the LL.D. degree are being conscripted. As a result, the quality of military legal officers has greatly improved; 4) the founding of the Military Law Society is currently ongoing; 5) research of foreign military laws, which was neglected and even prohibited in past decades and which was once dominated by the influence of the Soviet Union, has greatly expanded in recent years. Foreign legal systems, especially U.S. military laws, are now studied and recommended for their scientific approaches. As an example, the author of this commentary wrote an article entitled *An Outline of U.S. Military Law*, which was published in *Law Research Development*, a legal periodical of the Law Institute of the Academia Sinica, on 4 March 1981. Additionally, the author of this commentary has written a series of articles concerning the U.S. military legal system that appeared in the *Liberation Army Daily* on 13 October 1988, 10 November 1988, 17 November 1988, 15 December 1988, 29 December 1988, and 12 January 1989. The series is expected to continue. The Chinese translations of the text of the U.S. Uniform Code of Military Justice and of the book *Military Law in a Nutshell*, written by American Professors Charles A. Shanor and Timothy P. Terrell, have also been accomplished by the author of this commentary. All of the above-mentioned efforts have helped to break the blockade of exclusionism, and have drawn more and more attention within Chinese military law research circles. The author of this commentary is convinced that the experiences of legality in the developed countries can surely benefit the improvement of the Chinese military legal system in many respects.

Enormous problems remain, however. The Chinese military legal system is far from complete. Many important military regulations remain undrafted. The structure and function of the juridical organs are worthy of reassessment. Additional talented judge advocates, military counsel, and legal researchers are obviously desired. The dilemma posed by the following question remains: Is law superior to political power, or vice versa? Statutes promising judicial independence do not mean that administrative interference no longer exists. Military legal research has not yet received enough attention. The lack of financial support, the shortage of research information, and the difficulties of international exchanges are all obstructions that may affect future progress in this area.

Again, these comments are not offered to detract from the value of Captain Rodearmel's article in the slightest. The author of this commentary appreciates very much the excellent work that Captain Rodearmel has done. Further international exchanges of military law research are eagerly anticipated.

THE U.S. MILITARY DEATH PENALTY IN EUROPE: THREATS FROM RECENT EUROPEAN HUMAN RIGHTS DEVELOPMENTS

by Major John E. Parkerson, Jr.,* and Major Carolyn S. Stoehr**

I. INTRODUCTION

Recent human rights developments in Europe are creating an ironic dilemma for an American military justice system that generally prides itself in its success in securing broad protections for the individual rights of its accuseds. Tensions in Europe between U.S. military authorities and host nation justice officials over the ability of American military courts to impose the death penalty for capital offenses committed by U.S. military personnel are disturbing the previously tranquil arrangements concerning exercise of jurisdiction over offenses by American military members overseas. Specific cases in vital NATO countries, such as the Federal Republic of Germany, The Netherlands, and Italy, are warnings that the hitherto virtually unlimited ability of U.S. military courts to pronounce any punishment permitted by U.S. military law is being curbed significantly. By taking account of the growing European consensus against the death

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penalty, U.S. military accuseds stationed in Europe could soon utilize an avenue through European courts for compelling the European host nation¹ to refuse to relinquish jurisdiction to the United States in potential capital cases.

This article demonstrates that the European challenge to the U.S. military death penalty is real. It examines recent cases involving the death penalty in the civilian extradition arena and in the context of ongoing cases involving military personnel stationed in Europe, showing how European regional and national human rights standards concerning the death penalty ultimately may apply to U.S. soldiers stationed in Europe. The article focuses on the NATO Status of Forces Agreement (SOFA),² the treaty framework that regulates the stationing of U.S. forces in Europe and that provides in article VII³ an arrangement concerning the exercise of criminal jurisdiction. The article explains how that treaty scheme is increasingly constrained by changes in European attitudes, as revealed in European judicial decisions and political actions, that may result in a diminished U.S. capacity to impose the death sentence.

We discuss several examples that illustrate the challenge to the U.S. military death penalty. These include: instances where the Federal Republic of Germany either asserted or threatened to assert jurisdiction over U.S. military personnel in potential death penalty cases expressly because of its opposition to that sanction; and a murder case from The Netherlands in which a Dutch court not only blocked the U.S. from exercising its treaty prerogative to try a U.S. military member, but also in contravention of treaty obligations refused to permit U.S. authorities to retain custody of the individual pending trial. Finally, discussion of an important recent case from the European Court of Human Rights demonstrates the vulnerability of U.S. treaty arrangements in the criminal law field to regional European human rights obligations that are perceived to conflict with those

¹European courts cannot compel United States authorities to do anything with respect to the exercise of jurisdiction. Such an action would constitute a violation of long-standing, fundamental principles of sovereign immunity. *See generally* M. Shaw, *International Law* 342-92 (2d ed. 1986). That avenue, therefore, effectively is foreclosed for a U.S. soldier. *See* Gordon, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 *Mil. L. Rev.* 97 (1983) (asserting that an individual may not seek redress before the European Court of Human Rights against a state, such as the United States, that is not a party to the European Human Rights Convention).

²Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 *U.S.T.* 1792, *T.I.A.S.* No. 2846, 199 *U.N.T.S.* 67 [hereinafter NATO SOFA]

³*Id.* art. VII.

arrangements. That case is particularly interesting because it applied regional human rights obligations to constrain Great Britain from extraditing to the U.S., in accordance with an extradition treaty, a defendant who might become subject to the "death row phenomenon."⁴

These cases suggest that when the death penalty is at issue, emerging international human rights trends are likely to be injected more frequently into our most basic tool of military discipline, the military justice system, and will continue to affect the ability of the U.S. military to abide by its policy to maximize jurisdiction over its members for offenses committed overseas.⁵ The military legal community needs to understand the mechanism by which international or domestic tribunals, by applying the criteria of international conventions to which the U.S. may not even be party, can effectively prevent the U.S. from exercising jurisdiction over military personnel. By focusing attention on the death penalty problem, this article endeavors to prompt U.S. military authorities to plan carefully considered responses to actual conflicts with host nations over application of the death penalty. It could assist United States military attorneys who are stationed in Europe to better understand host nation and American concerns and to devise tactics to avoid conflict over the death penalty question with local host nation officials. Finally, demonstrating to the European host nations that the subject is of sufficient concern to United States lawyers as to warrant this kind of examination may benefit allied relationships and facilitate in resolving the question.

Until recently, United States military imposition of the death penalty in Europe was not especially controversial. Europeans generally appeared unconcerned about the prospects of American military personnel receiving the death penalty so long as it was not carried out on European soil.⁶ No serious effort was made to deprive U.S. military officials of the exercise of criminal jurisdiction in capital cases involving American military personnel. In fact, the consensus among U.S. military members and policymakers favored a situation where the United States retained jurisdiction to the greatest extent allowable by the treaty jurisdictional scheme. A number of factors contributed to this consensus. Nationalistic feelings caused some U.S. critics to maintain that relinquishing U.S. jurisdiction somehow in-

⁴*Soering Case*, 161 Eur. Ct. H.R. (ser. A) (1989).

⁵See *infra* text accompanying note 30.

⁶S. Lazareff, Status of Military Forces Under Current International Law 243 (1971).

fringed United States sovereignty; to permit foreign courts to try U.S. military members when those personnel were in that state to contribute to its defense seemed the ultimate ingratitude.⁷ Further, U.S. misconceptions about foreign law led others to believe that an accused—especially an American accused—is presumed guilty and has the burden of proving his innocence. Moreover, some Americans believed that many judges, particularly in France and Italy, were Communists; consequently, fair trials for American military personnel in those hostile courts were considered unlikely.⁸ The lack in European jurisdictions of clear, American-styled bills of rights was a rallying cry for many U.S. policymakers against trial of American military personnel by European judicial systems that were perceived to be inferior.⁹

Yet, from the individual military member's perspective, these American arguments favoring application of a kind of bill of rights, whether derived from U.S. constitutional principles or from article

⁷S. Lazareff, *supra* note 6, at 129.

⁸*Id.* at 128.

⁹*Id.* at 129-30. A fascinating set of facts supporting American fears of adjudication by foreign courts is presented by *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). Two American soldiers stationed in the Federal Republic of Germany (FRG) in 1970 were tried by a German court for attempted rape and related charges. They were found guilty and sentenced to three years' imprisonment. While their appeal was pending, the soldiers broke restriction while in American custody and returned to the United States, where they surrendered to U.S. authorities. They filed suit to enjoin the U.S. Government from returning them to the FRG, arguing, among other things, that they were deprived in the German trial of their fifth and sixth amendment rights. *Id.* at note 23. The United States Court of Appeals for the District of Columbia Circuit denied relief, stating that the U.S. Constitution clearly could not be applied to FRG courts. *Id.* at 1218. The case, however, is better known for the portion of the opinion that addresses the soldiers' claim of violations of the fair trial guarantees found in article VII of the NATO SOFA, including alleged deprivations of the right to speedy trial, counsel of their choice, competent interpreter, confrontation of witnesses, and a fair appeal for want of a verbatim transcript of trial. *Id.* at note 23. If the U.S. Government returned them to Germany, they argued, the U.S. would be abetting German violations of the treaty. *Id.* at 1214. The Court of Appeals held that, even assuming that the NATO SOFA guarantees had been denied, the violations were beyond American judicial review because the NATO SOFA specifies a strictly diplomatic machinery for resolving disputes concerning the application of the agreement. *Id.* at 1222-23. See NATO SOFA, *supra* note 2, art. XVI. For a thorough discussion of *Holmes v. Laird* as representative of the principle of executive branch willingness to intercede as the exclusive means for ensuring enforcement of article VII fair trial guarantees, see Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 Mil. L. Rev. 219, 224-27 (1984).

VII guarantees,¹⁰ may not be valid in view of recent developments concerning the death penalty. In those cases, a military member who faces the prospect of trial by a U.S. military court for a capital offense may consider trial by European host nation courts preferable. As European courts and policymakers become more vocal against the death penalty, one reasonably could expect host nation authorities and counsel for accused military members to explore possible methods for ensuring that the capital offender is not subjected to the jurisdiction of an American military court.

11. THE SOFA FRAMEWORK

A. THE JURISDICTIONAL SCHEME

A primary concern among Europeans and U.S. authorities should be the extent to which the jurisdictional scheme established by the NATO Status of Forces Agreement allows host nation assertions of jurisdiction based upon opposition to the death penalty. A brief examination of the NATO SOFA jurisdictional arrangement, followed by a discussion of some particular cases, will address this concern.

The issue of criminal jurisdiction over members of forces stationed in the host nation ("sending states' forces") generally is regarded as the key focus of the NATO SOFA.¹¹ Article VII of the treaty resolves issues of jurisdiction caused by the traditional conflict between the concepts of the immunity of a visiting foreign sovereign under the "law of the flag doctrine" and territorial sovereignty of the host state.¹² It establishes a right and precedence of member states to exercise criminal jurisdiction over the allied forces stationed in their territory. Article VII accomplishes this first by distinguishing between exclusive jurisdiction offenses and concurrent jurisdiction offenses.

¹⁰Fair trial guarantees for visiting forces' personnel who are tried by the host nation include the rights to a prompt and speedy trial, advanced notice of the charges, confrontation of witnesses, compulsory process for obtaining witnesses, legal representation of choice or free or assisted appointed representation, interpreter, to communicate with representatives of his own government, and to have a government representative present at the trial. NATO SOFA, art. VII, para. 9. *See, e.g.*, Dean, *supra* note 9, at 219-46.

¹¹*See, e.g.*, S. Lazareff, *supra* note 6, at 128; Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 Mil. L. Rev. 95 (1988).

¹²S. Lazareff, *supra* note 6. For a thorough analysis of the conflicting traditional jurisdictional principles in the context of article VII, NATO SOFA, and its implications on concepts of sovereignty, see Welton, *supra* note 11, at 82-92. Welton's application of the well-known Supreme Court case *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), to contemporary stationing agreement questions of foreign criminal jurisdiction is enlightening.

Exclusive jurisdiction offenses are those crimes that are punishable solely under either the laws of the sending state or the laws of the host receiving state.¹³ Relatively few offenses fall within this category. In the context of United States-host nation relations, U.S. sending state exclusive jurisdiction is limited as a practical matter to those offenses that are purely military in nature under the Uniform Code of Military Justice (UCMJ)¹⁴ and that are committed by U.S. military personnel.¹⁵ For the host receiving state, the provision applies primarily to certain offenses against host nation security that are committed by anyone, military or civilian, who is stationed in the host nation¹⁶ and also to *all* offenses committed by U.S. civilians and dependents who violate host nation laws.¹⁷ In peacetime, cases falling within U.S. exclusive jurisdiction will not raise death penalty questions because of the unavailability of that sanction for purely military offenses.¹⁸

In most cases, both states have concurrent jurisdiction because the offense violates the laws of both states. Article VII resolves the conflict between the two overlapping jurisdictions by dividing up jurisdictional rights with a system of priorities based on the nature of the offense.¹⁹ The primary right to exercise jurisdiction is granted to the

¹³NATO SOFA, art. VII, paras. 2(a) and 2(b).

¹⁴10 U.S.C. §§ 801-934 (1976) [hereinafter UCMJ]. Lazareff argues that, in view of the interrelated security interests of the NATO member states, there can be no exclusive jurisdiction with respect to security offenses. In his opinion, "the concept of an offense being exclusively against one of the two jurisdictions involved does not appear to be realistic, except in the case of an infraction to military discipline; i.e., an offense only affecting the relations between a state and its personnel, such as desertion, absence without leave, mutiny, failure to obey the orders, insubordination, etc." S. Lazareff, *supra* note 6, at 153.

¹⁵Sending state jurisdiction is limited to "persons subject to the military law of that State." NATO SOFA, art. VII, para. 2 (a). United States Supreme Court decisions restricted this category of persons in peacetime to military personnel, excluding from U.S. military court jurisdiction accompanying dependents and civilian personnel. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (dependent); *Grisham v. Hagan*, 361 U.S. 278 (1960) (dependent); *McElroy v. United States ex rel. Gualiaro*, 361 U.S. 281 (1960) (civilian employee); *Reid v. Covert*, 354 U.S. 1 (1957) (dependents). *See, e.g.*, S. Lazareff, *supra* note 6, at 146-47.

¹⁶NATO SOFA, art. VII, paras. 2(b) and 2(c). *See* S. Lazareff, *supra* note 6, at 152-56.

"NATO SOFA, art. VII, para. 2(b). Because offenses committed by U.S. civilians and dependents are not "punishable by the law of the sending State," exclusive jurisdiction by default devolves to the receiving state. Some other sending states, Canada, for example, are not so restricted and may try their overseas civilian employees and dependents by courts-martial or some form of special civilian court. *See, e.g.*, Gordon, *supra* note 1, at 54 and note 33 (citing National Defence Act, Can. Rev. Stat. Chap. N-4 §§ 55(1)(f), 55(4), 55(5) (1970)). *See also* S. Lazareff, *supra* note 6, at 140 (detailing the practices of the various sending states).

¹⁸Problems may arise, however, in the wartime context. *See infra* text accompanying notes 218-23.

¹⁹*See* S. Lazareff, *supra* note 6, at 160-61.

sending state in two categories of cases: offenses solely against its personnel (including civilians and dependents) or its property—so-called *inter se* cases; or when the offense arises out of the performance of official duty.²⁰ Theoretically, in these two categories of cases the sending state has the greater interest in asserting jurisdiction.²¹ As previously discussed, in the context of United States-host nation relations, U.S. sending state jurisdiction extends only to offenses that are committed by U.S. military personnel.²² The receiving state, that is the territorial sovereign, has the primary right to exercise jurisdiction in all other cases.²³ As a general rule, each peacetime offense for which the death penalty is authorized for U.S. military courts²⁴ is a concurrent jurisdiction offense.²⁵ Consequently, the process by which both states in practice exercise their primary rights to try these offenses becomes especially relevant.

Since both states in concurrent jurisdiction cases are competent to prosecute, the state having the primary right to exercise jurisdiction has the ability to give up its jurisdiction to the other state.²⁶ This possibility, formalized by the NATO SOFA,²⁷ provides each state the option either to exercise the primary right to prosecute or to “waive” the right by allowing the other state to assume jurisdiction over the case.²⁸ The only obligation upon the state receiving a request from

²⁰*Id.*; NATO SOFA, art. VII, para. 3(a).

²¹S. Lazareff, *supra* note 6, at 161.

²²The NATO SOFA, in concurrent jurisdiction cases, allows the sending state to exercise its primary right to jurisdiction over “a member of a force or of a civilian component.” NATO SOFA, art. VII, para. 3(a). The Supreme Court limited jurisdiction to military personnel. *See supra* note 15. Interestingly, sending states were not provided in the treaty with the primary right to exercise jurisdiction over dependents. Consequently, the sending state could exercise its jurisdiction to try dependents under the concurrent jurisdiction formulation only if the host nation receiving state declined to exercise jurisdiction. These persons benefit, so to speak, from a judicial vacuum if the receiving state declines to prosecute, owing to the inability of U.S. military courts to prosecute dependents. *See* S. Lazareff, *supra* note 6, at 162. Adverse administrative actions are available to U.S. military authorities against dependents and civilian employees. U.S. Army Europe, Reg. No. 27-3, Misconduct by Civilians Eligible to Receive Individual Logistic Support (5 Jan. 82).

²³NATO SOFA, art. VII, para. 3(b). The jurisdictional scheme thus recognizes both the “law of the flag doctrine” of the sending state and the territorial sovereignty of the receiving state. It is in this regard an arrangement that compromises by treaty the sovereign interests that conflict absent agreement. *See* Welton, *supra* note 11, at note 51; S. Lazareff, *supra* note 6, at 161, 193.

²⁴UCMJ art. 118, murder; UCMJ art. 120, rape (within parameters of *Coker v. Georgia*). *See also* UCMJ art. 94, mutiny and sedition; UCMJ art. 106a, espionage.

²⁵Certain serious offenses, including various homicides and violent crimes, such as rape, are against the laws of all European, and indeed all “civilized,” states.

²⁶*See, e.g.*, S. Lazareff, *supra* note 6, at 162, 194.

²⁷NATO SOFA, art. VII, para. 3(c).

²⁸*See* Dean, *supra* note 9, at 221.

the other state is to give "sympathetic consideration"²⁹ to the request. The possibility that the United States might actually waive jurisdiction in response to a host nation request, however, was extinguished domestically by a declaration expressing "the sense of the Senate" as part of the Senate's resolution of ratification to the NATO SOFA that is interpreted by U.S. military authorities as a requirement to maximize its jurisdiction to the greatest extent possible.³⁰ This means that not only will host receiving state requests for waivers to U.S. military authorities be refused,³¹ but also that in cases where the primary right rests in the host nation, the U.S. routinely would request that nation to waive its jurisdiction so that U.S. authorities could try the accused.³² The practice leaves only the possibility of receiving state waivers in response to U.S. requests.

"NATO SOFA, art. VII, para. 3(c). "The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance." *Id.* The decision whether to waive the primary right is an executive determination. U.S. soldiers cannot successfully challenge waiver decisions in U.S. courts. *See, e.g.,* *Wilson v. Girard*, 354 U.S. 524 (1957). In that case an American soldier stationed in Japan killed a Japanese woman while trying to frighten her away from a firing range area. U.S. authorities asserted the primary right to exercise jurisdiction on the basis of "performance of official duty." The Japanese insisted that they had the primary right because the soldier's act was, in their view, beyond the scope of his official duties. The United States then waived jurisdiction to the Japanese. While the U.S. military retained custody pending the Japanese trial, the soldier instituted habeas corpus proceedings in a U.S. federal court. The Supreme Court ultimately ruled on appeal that it could find no constitutional or statutory barrier to executive branch officials making the waiver decision. The decision was reached by applying negotiation procedures agreed upon by the two states. Therefore, the court will stay out of the question of which state will exercise jurisdiction when both states have jurisdiction. *Id.* *See* *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). The NATO SOFA contains a procedure for resolving disputes "relating to the interpretation or application" of the agreement "without recourse to any outside jurisdiction"; and if this method does not succeed, then the dispute "shall be referred to the North Atlantic Council." NATO SOFA, art. XVI.

³⁰The Senate declaration, adopted on July 15, 1953, did not expressly require that the United States attempt to obtain jurisdiction in all cases. Rather, the request for waiver is compulsory only whenever, in the opinion of the soldier's commanding officer, "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States." NATO SOFA, 4 U.S.T. 1792, 1828, T.I.A.S. No. 2846, p. 36. The Department of Defense implemented the Senate's mandate in Department of Defense Directive 5525.1, Status of Forces Policies and Information (20 Jan. 1966). Its standards and procedures are reproduced in a tri-service regulation. Army, Reg. No. 27-50/SECNAVINST 5820.4D/AFR 110-12 (1 Dec. 1984), Status of Forces Policies, Procedures and Information [hereinafter AR 27-50]. The regulation provides that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements." *Id.* at para. 1-7 (a). *See* Dean, *supra* note 9, at 221-23; S. Lazareff, *supra* note 6, at 197.

³¹AR 27-50, para. 1-7(c).

³²An exception exists with respect to civilian employees and dependents. *See supra* note 15. U.S. military authorities request host nation waivers in civilian cases, where the receiving state has the primary right, where administrative sanctions provide a suitable alternative corrective action or where it appears the accused may not receive a fair trial. AR 25-50, para. 1-7(b).

Responding to American pressure to "institutionalize" the U.S. policy of maximizing jurisdiction, several NATO receiving states agreed to generalized waivers of their primary right in concurrent jurisdiction cases.³³ A bilateral U.S. agreement with The Netherlands³⁴ designed to implement article VII of the NATO SOFA represents one kind of general waiver agreement. It requires The Netherlands authorities to waive its primary right upon request of U.S. authorities, except in cases where The Netherlands determines that it is of "particular importance" that they retain jurisdiction.³⁵ A multilateral agreement between the Federal Republic of Germany and those NATO states having forces stationed in Germany³⁶ represents a similar kind of waiver agreement. It "automatically"³⁷ waives the primary right of the Federal Republic to the pertinent sending state. The waiver may be recalled by the Germans, however, where "by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction."³⁸ These agreements supplementing the concurrent jurisdiction arrangements in article VII of the NATO SOFA thus reverse the system of priorities, allowing the U.S., as sending state, to exercise jurisdiction in the vast majority of cases that occur in the receiving state. The receiving state then retains only the exceptional cases, regardless of the state that has the greatest interest in trying the offense.³⁹

³³See S. Lazareff, *supra* note 6, at 194-95.

³⁴Agreement with Annex Between the United States of America and The Netherlands regarding Stationing of United States Armed Forces in The Netherlands, August 13, 1954, 6 U.S.T. 103; T.I.A.S. No. 3174; 251 U.N.T.S. 91 [hereinafter Netherlands Agreement].

³⁵*Id.* at annex, para. 3. The United States concluded a similar agreement with Greece. T.I.A.S. No. 3649.

³⁶Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with Respect to Foreign Forces stationed in the Federal Republic of Germany, with Protocol of Signature, August 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter German Supplementary Agreement]. Both this agreement and the NATO SOFA, *supra* note 2, entered into force for the Federal Republic of Germany on July 1, 1963. Bundesgesetzblatt [BGBl] 1963 II S. 745.

³⁷German Supplementary Agreement (Protocol), Re art. 19, para. 1. No request for waiver is necessary.

³⁸German Supplementary Agreement, art. 19, para. 3. The sending state "notifies" German authorities of particular cases that fall under the waiver provisions. German Supplementary Agreement, art. 19, para. 2. The Germans then have 21 days within which to exercise a recall. *Id.* art. 19, para. 3. Individual sending states and Laender (states) may make arrangements dispensing with both the notice and 21-day requirements. *Id.* art. 19, para. 7. Files maintained by the U.S. Army, Europe, and the Office of The Judge Advocate General, U.S. Army, indicate that no arrangements concerning the period for recall exist. Several arrangements do exist, however, that dispense with the notification obligation concerning specified, primarily minor, offenses. Federal states having these arrangements include Baden-Wuerttemberg, Bavaria, Bremen, Hesse, and Rhineland-Palatinate.

³⁹See S. Lazareff, *supra* note 6, at 195; Welton, *supra* note 11, at note 74.

B. GENERAL PRACTICE UNDER THE SOFA FRAMEWORK

These arrangements historically have worked well. Close cooperation between the sending states' military authorities and host receiving state justice ministries resulted in host nation waivers of all but a very few cases. Department of Defense statistics show that within NATO for the 1988 reporting year, the last year for which complete statistics are available, the number of receiving state primary concurrent jurisdiction cases involving U.S. military personnel was 12,674.⁴⁰ Of these, a waiver of jurisdiction was obtained in 12,269, or 96.8%, of the cases.⁴¹ Focusing more narrowly on the offense that carries the greatest potential for a death sentence, seven of those offenses were murders, and only one of those cases was not waived to the sending state.⁴² Of the NATO receiving state primary concurrent jurisdiction cases, 11,833 occurred in the Federal Republic of Germany, where waivers were recalled in only five, or roughly 0.1%, of cases involving U.S. military personnel.⁴³ All seven murders from the 1988 report, including of course the one recall, occurred in Germany. Just ten years earlier, Germany had recalled waivers in 72 cases involving U.S. military personnel.⁴⁵ Comparable percentages reflect the practice in The Netherlands, for example, which waived 97.8% of its primary concurrent jurisdiction cases involving U.S. military personnel.⁴⁶ Looking at waiver statistics as a whole, including all offenses, U.S. authorities undoubtedly are growing even more successful in obtaining host nation waivers in receiving state primary

⁴⁰Dep't. of Defense, Report of Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel, 1 Dec. 87-30 Nov. 88 [hereinafter DOD Report]. The annual report is prepared by the Office of The Judge Advocate General, Department of the Army, as executive agent for Department of Defense. Approximately one-half of these were traffic offenses. *Id.* The 1989 statistics are yet to be compiled.

⁴¹*Id.* This compares with 15,571 receiving state primary concurrent jurisdiction offenses during 1988 involving U.S. military personnel worldwide, of which waivers were obtained in 14,028, or 90%, of those cases. *Id.*

⁴²The numbers worldwide are 10 murders, with waivers obtained in all but 3. *Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵Statistics for 1978 maintained in the Office of the Judge Advocate, U.S. Army, Europe.

⁴⁶The much smaller U.S. force in The Netherlands as contrasted with the FRG is reflected by the 94 cases, of which 92 were waived to U.S. military authorities. *Id.* A number of factors can account for statistics that may appear to illustrate considerably less U.S. success in obtaining host nation waivers in some other states. Distortions occur as the result of small numbers of military personnel in particular countries, host nation policies regarding prosecutorial discretion, the status of U.S. political relations with the state, and difficulties in categorizing some kinds of offenses.

jurisdiction cases.⁴⁷ While U.S. authorities in 1957 had a 57% success rate in obtaining waivers within NATO, the percentage had increased to 93.4% by the end of 1967⁴⁸ and to the 96.8% reported in 1988.⁴⁹

U.S. military authorities advanced several explanations for American success in securing waivers: growing confidence of host nation prosecutors and courts in the U.S. military justice system; better sending state-receiving state communications in these matters; the fact that U.S. military courts generally deal more firmly than local courts with military accuseds, particularly with regard to youthful offenders; as well as the natural desire to allow sending states to handle their own citizens and thereby conserve local judicial and law enforcement resources.⁵⁰ Yet, with respect to cases that potentially carry the death penalty, a trend in the opposite direction from routine waivers clearly is developing. Receiving state justice officials who once may have used the waiver mechanism as a means of avoiding prosecutorial responsibilities, or indeed who may secretly have envied the availability of the death penalty in the American military justice system, are increasingly finding waivers in potential capital cases politically unacceptable.⁵¹ With growing frequency, European host receiving states are claiming potential capital cases to be of "particular importance"⁵² or that they affect "major interests" in their administration of justice.⁵³

The stationing arrangements offer little guidance regarding the kinds of cases that are of "particular importance" or that affect "major interests" in host nation administration of justice. They do not in any event require or even encourage host nations to refuse to waive jurisdiction in potential capital cases. The only reference to the death penalty is in article VII, paragraph 7(a): "A death sentence shall not be *carried out* in the receiving State by the authorities of

⁴⁷For an insightful look at the practice in Germany, see Davis, *Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, The Army Lawyer, May 1988, at 30, 33.

⁴⁸S. Lazareff, *supra* note 6, at 258. See, e.g., *id.* at 257-60; H. Steiner and D. Vagts, *Transnational Legal Problems* 899 (2d ed. 1976).

⁴⁹See *supra* text accompanying note 41.

⁵⁰United States Army, Europe & 7th Army, International Affairs Division, Recall Rate, Ten-Year Analysis: 1977-1986 (1986), *cited in* Davis, *supra* note 47, at 33.

⁵¹Letter from COL Barry Steinberg, Staff Judge Advocate, VII Corps, to the Judge Advocate, HQ, USAREUR & 7th Army (Feb. 5, 1986) [hereinafter Steinberg Letter] (discussing Bavarian recall of jurisdiction in potential capital referral cases). See Davis, *supra* note 47, at 33.

⁵²See *supra* text accompanying note 35.

⁵³See *supra* text accompanying note 38.

the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.”⁵⁴ Notice that the United States, then, is prevented only from carrying out adjudged death sentences on host nation territory. The negotiating history supports a conclusion that in no respect can the provision be interpreted to bar a judgment prescribing the death penalty or the carrying out of the sentence in the United States.⁵⁵ Although not conclusive with respect to other receiving states, the arrangements with the Federal Republic of Germany support this conclusion. They state that “major interests of German administration of justice” are determined by “careful examination of each specific case.”⁵⁶ However, certain kinds of cases, such as homicides, robbery, and rape, “may make imperative the exercise of German jurisdiction,” unless the victims are sending states personnel.⁵⁷ The focus, then, is not on the potential *sentence* that each of these offenses carries; rather it is upon the *kind of offense* in each individual case. As a result, officials in the host nation who are responsible for the administration of justice may not when making waiver decisions be guided by whether a U.S. military court might impose the death sentence in particular cases.

C. CASE STUDIES

Several recent cases disclose that host nation officials now have a different view of the practice concerning capital case waivers of the primary right to exercise jurisdiction under the NATO SOFA framework. A look at the most visible receiving state, the Federal Republic of Germany, is illustrative. Recent pronouncements in German legal publications⁵⁸ and in the press⁵⁹ express a growing opinion that “imposition”—not “execution”—of the death penalty on German territory violates the constitutional abolition of the death penalty in the Federal Republic of Germany.⁶⁰ German governmental of-

⁵⁴NATO SOFA, art. VII, para. 7 (a) (emphasis added).

⁵⁵See S. Lazareff, *supra* note 6, at 243. The Norwegians raised the question during the NATO SOFA working sessions. Norway noted that it abolished capital punishment a half-century earlier and that the last peace-time execution occurred in 1875. It expressed concern that a provision allowing executions on Norwegian territory would create violent reactions in Norway. It was in response to this Norwegian concern that the drafters crafted the language in article VII, paragraph 7(a). *Id.*

⁵⁶German Supplementary Agreement (Protocol), Re art. 19, para. 2(a) (ii).

⁵⁷*Id.*

⁵⁸Prof. Dr. Rolf-Peter Callies, *The Death Penalty in the Federal Republic of Germany*, Neue Juristische Wochenschrift (New Legal Weekly Review), Apr. 6, 1988 (translated excerpt provided by Office of the Judge Advocate, HQ, USAREUR & 7th Army).

⁵⁹Frankfurter Allgemeine Zeitung, Feb. 17, 1989.

⁶⁰See, e.g., Grundgesetz (German Basic Law), art. 102.

ficials also are expressing the opinion that for constitutional and political reasons, military courts should discontinue prescribing death sentences in the Federal Republic.⁶¹ No less a receiving state official than German Foreign Minister Hans-Dietrich Genscher wrote a personal plea to then-Secretary of State George Shultz in July 1988 expressing concern over a U.S. military death penalty case in Germany.⁶² German officials have advised justice authorities in the federal German states (Laender) to consider the constitutional ban on the death penalty when examining German "major interests" for purposes of recall.⁶³ And in marked contrast to previous years,⁶⁴ at least three cases recalled by German authorities during 1989 had death penalty "overtones."⁶⁵ Similar attitudes recently surfaced in The Netherlands⁶⁶ and in Italy⁶⁷ and are threatening to surface elsewhere. What these cases appear to have in common is that they are attempts by the host nations to create a class of cases based on their potential for imposition of the death penalty, rather than to make a case-by-case waiver decision based on the type of offense and the surrounding circumstances.

⁶¹*Id.* (citing the opinion of Federal Minister of Justice Peter Caesar); Letter from Bendel, for the Federal Minister of Justice, to Brigadier General Dulaney O'Roark, Judge Advocate, HQ, USAREUR & 7th Army (Jan. 26, 1988) [hereinafter Bendel Letter] (discussing the position of Laender Ministers of Justice that abolition of capital punishment in the Basic Law makes it politically and constitutionally desirable that sending states' military courts not impose the death penalty for offenses committed in Germany). Amnesty International also is pressuring government officials to take steps to limit exercise of jurisdiction by U.S. military courts in capital cases. Stars and Stripes, Oct. 11, 1985, at 9, col. 1 ("Amnesty International will put its weight behind saving GIs from the death penalty"); Letter from Brigitte Erler, Secretary General, Amnesty International, FRG section, to Wolfgang Kahw, Senator for Justice, Bremen (May 6, 1985) (requesting information from Bremen Ministry of Justice concerning recalls of waiver in U.S. military capital cases).

⁶²Letter from Hans-Dietrich Genscher, Foreign Minister, Federal Republic of Germany, to George Shultz, Secretary of State (Jul. 25, 1988), quoted in Telecommunications Message from Secretary of State to American Embassy, Bonn (U) (Sep. 17, 1988) (expressing concern, in view of constitutional prohibitions and German initiative in United Nations for global abolition of capital punishment, over the December 1987 death sentence of Private James Murphy by U.S. court-martial in Frankfurt).

⁶³Bendel Letter, *supra* note 61 (discussing the position of the Laender Ministers of Justice that the possibility of the death penalty must be taken into consideration when examining whether "major interests of German administration of justice" require the exercise of German jurisdiction). See also Steinberg Letter, *supra* note 51.

⁶⁴See *supra* text accompanying notes 42-44.

⁶⁵Telephone interview with George Bahamonde, Special Assistant to the USAREUR Judge Advocate (Oct. 20, 1989).

⁶⁶See *infra* text accompanying notes 93-98.

⁶⁷See, e.g., Telecommunications Message from HQ, USAF, Ramstein to HQ, USAF Washington (U) (May 18, 1988) [hereinafter Message: Dutch Status Report] (providing status report on capital cases in which U.S. military authorities are experiencing waiver and custody problems with host nation officials).

If any single case galvanized German, and perhaps European, public opinion and caused host nation officials to re-examine waiver arrangements as they pertain to capital cases, it would be the November 1984 court-martial of Private First Class Todd A. Dock.⁶⁸ The nineteen-year-old U.S. Army soldier was sentenced to death by military court for the murder and robbery of a German taxi driver.⁶⁹ In Germany, a court can apply juvenile law to the case of a criminal accused between the ages of eighteen and twenty-one if the court determines that the accused's moral or mental development was equal to that of a juvenile or if the offense was one characteristic of youth.⁷⁰ If the court decided to apply juvenile law to the case, the maximum sentence would be ten years.⁷¹ Otherwise, if tried as an adult, the maximum sentence in Germany for murder is life imprisonment.⁷² The divergence in potential penalties caused by the availability of the death penalty in court-martial murder cases, regardless of the soldier's age, was the focus of considerable attention from the news media, the German public, and host government officials.⁷³ Interestingly, it appears that German authorities, who otherwise may have been tempted to recall the waiver of jurisdiction in this case, apparently felt unable to exercise the right because Dock refused to cooperate with them.⁷⁴

The Dock case raises for the United States military the interesting ancillary issue of the extent to which U.S. military defense attorneys in NATO receiving states should attempt to influence host nation

⁶⁸The case precipitated Amnesty International's interest in U.S. military court imposition of the death penalty in Europe. Stars and Stripes, Oct. 11, 1985, at 9, col. 1; Stars and Stripes, Aug. 18, 1989, at 28, col. 1, 2; Army Times, Sep. 4, 1989, at 10, col. 1.

⁶⁹Dock stabbed to death the Butzbach cab driver in connection with a \$250 robbery. United States v. Dock, 28 M.J. 117, 119 (C.M.A. 1989).

⁷⁰Jugendgerichtsgesetz (German Youth Court Law), §§ 1(2), 105(1) (BGBl. 1974 I. 3427).

⁷¹*Id.* § 105(3).

⁷²Strafgesetzbuch (German Criminal Code), § 211(1) (BGBl. 1981 I, 1329). Accuseds between eighteen and twenty-one could be tried as adolescents if the conditions for applying juvenile law are not met, in which case ten to fifteen years may be imposed in place of life imprisonment. Jugendgerichtsgesetz, *supra* note 70, § 106(1).

⁷³The *Army Times* characterized the waiver procedures as applied to capital cases as "death penalty roulette." Army Times, Sep. 4, 1989, at 10, col. 1. Inaccuracies in the *Army Times* account prompted a response from U.S. military authorities. See Letter from Brigadier General Donald Hansen, Assistant Judge Advocate General for Military Law, U.S. Army, to Readers Respond, Army Times (Sep. 8, 1989).

⁷⁴Army Times, Sep. 4, 1989, at 10, col. 1, 3 (quoting Dock's mother); Davis, *supra* note 165, at 34 n.40 (stating that Dock desired to be tried by U.S. military authorities).

authorities not to waive jurisdiction in a particular case.⁷⁵ Whether or not the effort was considered by defense counsel in Dock's case, the facts represent a prime example of a situation where a military member might benefit from some kind of challenge in host nation fora to a potential receiving state waiver.⁷⁶ Any challenge, however, must be made before the waiver becomes effective and the U.S. military authorities actually exercise jurisdiction following the waiver. Once jurisdiction is exercised, the accused loses standing in a U.S. court to object to the waiver of primary jurisdiction.⁷⁷ The receiving state also is barred from asserting jurisdiction in cases where U.S. authorities, acting in reliance on the waiver, have taken actions toward exercising jurisdiction.⁷⁸

⁷⁵See Davis, *supra* note 47, at 34. Davis contends that direct contact by defense counsel with host nation justice authorities for the purpose of influencing their waiver decisions may be banned by military regulation and the Logan Act. *Id.* (citing USAREUR Reg. 550-56, para. 6.b.(1), and 18 U.S.C. 953 (1982)). He points out, however, that to interpret those provisions in this manner impermissibly allows the anomalous result of denying an accused the right to effective counsel acting in the client's best interests. In any event, these U.S. prohibitions do not prevent host nation attorneys or private citizens from urging receiving state retention of primary jurisdiction. *Id.*

⁷⁶PFC Dock recently was spared the death penalty. In May 1988 the Army Court of Military Review (ACMR) overturned the conviction on the grounds that Dock's guilty pleas to unpremeditated murder and robbery were improperly accepted at trial. Article 45 of the Uniform Code of Military Justice prohibits a plea of guilty to a charge for which the death penalty may be adjudged. Because Dock's pleas amounted to a plea of guilty to felony murder, for which the death penalty is authorized, article 45 was violated. ACMR also considered newly discovered evidence regarding Dock's state of mental responsibility. It remanded the case for retrial in Germany. *United States v. Dock*, 26 M.J. 620 (A.C.M.R. 1988). The Court of Military Appeals affirmed the Army court's decision in May 1989. *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989). Memorandum from Colonel Steven Lancaster, Acting Judge Advocate, HQ, USAREUR & 7th Army, for Commander in Chief, USAREUR & 7th Army (May 22, 1989) (concerning setting aside of conviction of PFC Todd A. Dock). See also *Army Times*, Sep. 4, 1989, at 10, col. 1, 3. At the new trial, in Hanau in November 1989, Dock was convicted and sentenced to life in prison. *Stars and Stripes*, Aug. 18, 1989, at 28, col. 1, 2; *Wash. Post*, Dec. 5, 1989, at D1, col. 3.

⁷⁷Because the exercise of jurisdiction is based on international agreement, and because the NATO SOFA provides a strictly diplomatic machinery for resolving disputes concerning the application of the agreements, individuals have no standing to challenge these actions between two sovereigns. See Davis, *supra* note 47, at 34 and 34 n.46 (citing *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983); *United States v. Evans*, 6 M.J. 577 (A.C.M.R. 1978), *petition denied*, 6 M.J. 239 (C.M.A. 1979)).

⁷⁸The U.S. position with respect to Germany is that, after German authorities waive primary jurisdiction, either formally or by expiration of the twenty-one day recall period, they cannot unilaterally reassert their primary right to exercise jurisdiction, even where disposition by U.S. authorities does not result in acquittal or conviction by court-martial. *United States Army, Europe & 7th Army, International Affairs Division, Recall of Jurisdiction Following Waiver* (No. 103-05:45), cited in Davis, *supra* note 47, at 32. At least three German Superior State Courts affirmed this position. Davis, *supra* note 47, at 32. See S. Lazareff, *supra* note 6, at 208 ("The waiver being considered irrevocable and unconditional, the State formerly having the primary right to exercise jurisdiction loses any legal interest or voice in any subsequent action taken in the case"). Lazareff cites at some length an interesting early case from France involving a U.S. Air Force Major Whitley, who lost control of his automobile and crashed,

Because decisions concerning the exercise of the primary right need to be made before jurisdiction is asserted, European receiving state authorities are attempting to elicit from U.S. military authorities advance guarantees that the cases carrying the greatest potential for imposition of the death penalty will not be tried as capital cases. In exchange, the host nation will agree to waive its primary right to exercise jurisdiction.⁷⁹ U.S. military authorities uniformly deny these host nation requests because United States military law leaves the decision whether to “refer” a particular case capital solely to the General Court-Martial Convening Authority—a General officer who has been appointed to that responsibility.⁸⁰ To accede to host nation pressures in this regard thereby would violate procedures mandated by U.S. statute⁸¹ and would constitute a modification of jurisdictional

killing a Canadian Air Force Major who was his passenger. In response to an American request, France waived its primary right to exercise jurisdiction in the case. American authorities subsequently decided not to take any judicial action. The Canadian officer's widow then instituted a criminal action based on her private complaint. The criminal court held that the French prosecutor's waiver could not divest a private citizen of the right to secure redress in the criminal courts. The Court of Cassation ultimately reversed by ruling that the waiver of jurisdiction by the state having the primary right is final and no longer permits the criminal courts of the receiving state to assert jurisdiction over the subject matter of the waiver. *Id.* at 200-08.

An interesting case that arose in the context of extradition is *Moyer Reed Plaster v. United States*, 789 F.2d 289 (4th Cir. 1986). The relevant facts in this habeas corpus action concern a U.S. military promise of immunity to Plaster in exchange for his testimony against another soldier who was involved with Plaster in the 1965 murder of a German taxi driver. Germany did not recall its waiver, so the case was to proceed to court-martial. Meanwhile, the soldiers went AWOL, returned to the United States, and were involved in another murder in Wisconsin. They were convicted and sentenced to confinement in Wisconsin. Court-martial charges against the soldiers, meanwhile, were dropped. Following Plaster's release from confinement in Wisconsin, Germany requested his extradition for the taxi driver murder. The U.S. took Plaster into custody awaiting the extradition hearing, whereupon Plaster filed for habeas corpus asserting the prior promise of immunity. The Court of Appeals held that the promise of immunity was a sufficient exercise of U.S. jurisdiction over the case as it pertained to Plaster, so that the German request for his extradition would be barred. *Id.* Some have asserted that even without extradition, the NATO SOFA provides a basis for returning a soldier to a receiving state where the host nation asserts its primary right in a concurrent jurisdiction case. *See, e.g., Norton, U.S. Obligations under SOFA: A New Method of Extradition?*, 5 Ga. J. Int'l Comp. L. 1 (1975).

⁷⁹See Letter from Major Joseph Hall, Chief, International Affairs Division, HQ, VII Corps, to Office of the Judge Advocate, HQ, USAREUR & 7th Army (Mar. 21, 1986).

⁸⁰Memorandum from Brigadier General Dulaney O'Roark, Judge Advocate, HQ, USAREUR & 7th Army, for Commander in Chief, USAREUR & 7th Army (Oct. 17, 1988); Telecommunications Message from Secretary of State to American Embassy, The Hague (U) (Sep. 12, 1988) [hereinafter Message: Short Case] (citing SOFA arrangements with The Netherlands government as the applicable legal framework, and U.S. unwillingness to establish the precedent of maximum sentence guarantees in particular cases). *See* R.C.M. 504(b)(1) (concerning who may exercise general court-martial jurisdiction). “Referral” is the order of a convening authority that charges against an accused will be tried by a specified court-martial. R.C.M. 601(a).

⁸¹The decision to refer capital can be made only after certain preliminary steps are completed, such as a formal pretrial investigation.

arrangements that allow waiver in all but exceptional cases, determined by examination of the offense on a case-by-case basis.⁸² Nevertheless, the question of advance U.S. guarantees represents a dilemma for the U.S. forces. It ultimately can force the United States to choose between two incompatible alternatives. The U.S. could continue its policy of maximizing jurisdiction over U.S. soldiers who commit criminal offenses at the cost of agreeing to host nation demands not to try a case capital. Or the U.S. could stand by its treaty rights and either refer the case capital or not divulge its intentions regarding whether the U.S. plans to refer the case capital, and thereby run the considerable risk that the host nation will not give up its primary right to exercise jurisdiction over the military member.⁸³

In practice, United States refusal to provide advance guarantees in potential capital cases to host nation authorities is resulting in fewer receiving state waivers in these cases. An April 1989 capital case from the German state of Rheinland-Pfalz involving the attempted rape and stabbing death of a seventeen-year-old Turkish girl by a U.S. soldier in Mainz was not recalled, despite unsuccessful attempts by the German public prosecutor handling the case to obtain U.S. assurances that the case would not be referred capital.⁸⁴ However, for the first time, Rheinland-Pfalz authorities in May 1989 recalled their waiver in a murder case involving two U.S. soldiers rather than allowing the soldiers to face a potential death penalty. The victim in the case was a woman holding dual Brazilian and West German citizenship. The soldiers left a bar in Idar-Oberstein in the company of the woman, later unsuccessfully attempted to rape her, and then killed her by standing on her neck and stabbing her eleven times.⁸⁵ The Germans requested from U.S. military authorities a letter stating that it was unlikely that the soldiers would be sentenced to death by a court-martial; in exchange, they would not recall the

⁸²See *supra* text accompanying notes 55-57.

⁸³See Major Joseph Hall, Memorandum for Record, subject: Bavarian Recall of Jurisdiction in Potential Capital Referral Cases (Feb. 5, 1986).

⁸⁴See Memorandum from Paul J. Conderman, Chief, INTERCRIM & Civil Process Branch, International Law Division, for the Judge Advocate, HQ, USAREUR & 7th Army, subject: Host Nation Interest in Potential Death Penalty Cases (Oct. 14, 1988). The soldier, Specialist Emery L. Franklin, received a life sentence when the jury did not render a unanimous vote on his guilt. Stars and Stripes, Aug. 18, 1989, at 28, col. 1, 2; Stars and Stripes, Sep. 4, 1989, at 10, col. 1, 5.

⁸⁵Stars and Stripes, Aug. 18, 1989, at 28, col. 1; Stars and Stripes, Sep. 4, 1989, at 10, col. 1.

waiver in the cases. U.S. authorities refused, and the cases were recalled.⁸⁶

The threat to the U.S. military ability to impose the death penalty does not extend solely to concurrent jurisdiction cases in which the receiving state has the primary right to exercise jurisdiction. It appears to be broadening to the classes of cases that previously were regarded by American officials as untouchable—those cases where the U.S. has the primary right to exercise jurisdiction. These difficult so-called *inter se* cases have the potential for creating lasting tensions with host nations that station U.S. forces. The U.S. policy against granting waivers of its primary right in concurrent jurisdiction cases to receiving states that request U.S. waivers⁸⁷ eventually may force the U.S., because of host nation political and judicial pressures, to try its death penalty cases outside of Europe.⁸⁸ Alternatively, the U.S. may find itself at some point required to modify its position of declining host nation requests for waivers where the United States has the primary right to exercise jurisdiction.

Two recent *inter se* cases in Italy and The Netherlands illustrate the problems that the death penalty can create, even though by article VII of the NATO SOFA⁸⁹ the United States clearly has the primary right to exercise jurisdiction over these cases.⁹⁰ Both cases complicated the death penalty issue because in each case, host nation courts initially refused to allow return of the accused military member to U.S. custody until the United States agreed not to execute the individual in the event that a court-martial imposed the death

⁸⁶Memorandum from Colonel Steven Lancaster, Acting Judge Advocate, HQ, USAREUR & 7th Army, for Commander in Chief, USAREUR & 7th Army, subject: Recall of Capital Murder Cases (undated). The cases are unusual procedurally because they were referred capital before the Germans made their recall decision, unlike the usual practice in Germany in the overwhelming majority of cases where recall occurs before referral of the charges to trial. Referral took place in the instant cases before recall because German officials appeared to be delaying their decision on recall until after local elections. U.S. authorities feared a "speedy trial problem" if referral was delayed further. *Id.* For political reasons, neither side decided to insist on strict adherence to the time requirements for notification of waiver.

⁸⁷See *supra* text accompanying notes 30-31.

⁸⁸The practical difficulties in conducting a trial outside of the territory where the crime occurred and where the witnesses and other evidence likely are located are enormous counter pressures that could cause some kind of modification of the U.S. policy against waiving its primary right. See Memorandum from Colonel Steven Lancaster, Acting Judge Advocate, HQ, USAREUR & 7th Army, for Chief of Staff, USAREUR & 7th Army, subject: Program for Principal Officers Conference. Nov. 2-4, '89 (Oct. 30, 1989) (providing proposed talker on the death penalty).

⁸⁹NATO SOFA, art. VII, para. 3(a).

⁹⁰See *supra* text accompanying notes 20-22.

penalty.⁹¹ This action was in clear violation of agreements implementing the NATO SOFA that granted sending states authorities the right to retain custody of their personnel pending final adjudication of the criminal case.⁹²

The case from The Netherlands most glaringly exposes the potential for U.S.-host nation conflict over the death penalty. U.S. Air Force Sergeant Charles D. Short, serving at an air base near Soesterberg, The Netherlands, killed his Turkish wife and cut the body into a large number of pieces, which he then dumped along a deserted roadside. He was arrested in March 1988 by U.S. military police at his base and then was turned over for investigation to Dutch police, to whom Short confessed.⁹³ Still in Dutch custody, Short's Dutch defense counsel entered a Dutch court in The Hague and in May 1988 obtained a court order instructing Dutch authorities not to release Short to U.S. custody until they first attempted to secure a U.S. waiver of jurisdiction, and if that failed, to open negotiations with U.S. authorities about a guarantee that any death sentence that may be adjudged by court-martial in the case would not be carried out.⁹⁴ The Dutch judge stated that without such a guarantee, turning Short over to U.S. military authorities would be contrary to the fundamental principle of Dutch law that capital punishment must be avoided as much as possible.⁹⁵ Following the mandated approach by the Dutch Ministry of Justice to U.S. military authorities⁹⁶ and subsequent meetings between U.S. and Dutch officials, the United States in September 1988 delivered a diplomatic note to Dutch government officials categorical-

⁹¹The 1987 Italian case involved an Army sergeant stationed at Camp Darby, Italy, who killed another soldier. Diplomatic intervention finally secured return of the accused to U.S. custody. Memorandum from Brigadier General Dulaney O'Roark, Judge Advocate, HQ, USAREUR & 7th Army, for Commander in Chief, USAREUR & 7th Army, subject: USAFE murder suspect in Dutch custody (May 17, 1988); Message: Dutch Status Report, *supra* note 67.

⁹²See Netherlands Agreement, para. 3; German Supplementary Agreement, art. 22.

⁹³Stars and Stripes, May 11, 1988. Short murdered his wife because she threatened to leave him and take the couple's eight-month-old son. Stars and Stripes, Oct. 12, 1988.

⁹⁴Charles Donald Short v. The State of The Netherlands, No. 88/614 and 88/615 (District Court, The Hague, May 9, 1988). See also Stars and Stripes, May 11, 1988; Message: Dutch Status Report, *supra* note 67.

⁹⁵*Id.* This was the only legal argument, among many submitted by Short's defense counsel, that the court accepted. Among the arguments dismissed by the judge were those based on article 13 of the International Covenant on Civil and Political Rights and article 6 of the European Convention for the Protection of the Rights of Man and Fundamental Freedoms. See the Short case, No. 88/614 and 88/615. The court also stated that the principle concerning the avoidance of capital punishment is what makes the case of "particular importance" as a proper basis for the Dutch to request the U.S. to waive its primary right and to give "sympathetic consideration" to the Dutch request. *Id.*; NATO SOFA, art. VII, para. 3(c). See *supra* note 29.

⁹⁶Message: Dutch Status Report, *supra* note 67.

ly declining either to waive the U.S. primary right to exercise jurisdiction or to make commitments concerning how a death sentence, if adjudged by a court-martial, would be carried out.⁹⁷ With the jurisdictional conflict still unresolved, a Dutch court tried Short and returned a homicide conviction in October 1988, sentencing him to six years in prison and commitment to a mental institution.⁹⁸

These cases reveal the vulnerability in Europe of the U.S. military death penalty. Although no death penalty adjudged by U.S. military courts in NATO receiving states has ever been executed,⁹⁹ European pressures against *imposition* of the death penalty on European territory continue to mount.

111. THE HUMAN RIGHTS FRAMEWORK

The cases just discussed highlight the legal problems that arise when a receiving state determines that application of provisions of the NATO SOFA conflicts with that state's constitution or other domestic law. Additional legal problems arise if there is a conflict between the provisions of the NATO SOFA and another treaty to which the state is a party. The problems that surface when two treaties conflict are illustrated by a recent death penalty case that the European Court of Human Rights decided involving an extradition treaty and a human rights treaty known as the European Convention.¹⁰⁰ That case, *Soering*,¹⁰¹ did not involve a U.S. military member. Nevertheless, it points out yet another avenue by which NATO countries opposed to the death penalty may try to prevent the U.S. from imposing that sanction. It will be useful to examine the structure of the European Convention and the *Sowing* case to see how human rights treaties might affect the ability of the U.S. military to impose the death penalty, even when the U.S. is not a party.

⁹⁷Message: Short Case, *supra* note 80. *See supra* text accompanying note 80.

⁹⁸Stars and Stripes, Oct. 12, 1988. *See infra* note 174.

⁹⁹Not all cases that are referred capital by U.S. authorities result in convictions or death sentences, of course. Since 1960, U.S. **Army** courts-martial in the Federal Republic of Germany have adjudged the death penalty in five cases. In three of the five cases, the sentences were commuted to life imprisonment. Both of the remaining cases are still in the appellate process. Records maintained in the Office of the Judge Advocate, U.S. Army, Europe.

¹⁰⁰European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

¹⁰¹*Soering Case*, *supra* note 4.

A. THE EUROPEAN CONVENTION

The European Convention of Human Rights is a multilateral treaty under the Council of Europe that sets forth its aim to secure universal recognition and observance of human rights contained in the Universal Declaration of Human Rights.¹⁰² The European Convention denotes these rights as fundamental freedoms and sets up an enforcement mechanism to protect them through the Committee of Ministers, the European Commission of Human Rights, and the European Court of Human Rights.¹⁰³ The European Convention entered into force in 1953.¹⁰⁴ Eleven of the thirteen parties to the NATO SOFA have ratified the European Convention.¹⁰⁵ Only the U.S. and Canada have not.

The European Convention itself **does** not prohibit the death penalty. Article 2 allows capital punishment when carried out in accordance with the provisions of law.¹⁰⁶ Article 3 of the Convention prohibits inhuman or degrading treatment or punishment.¹⁰⁷ An Optional Protocol No. 6 to the Convention, however, abolishes the death penalty.¹⁰⁸ This Protocol entered into force in 1985 and now has thirteen ratifications.¹⁰⁹ Several of the countries that have ratified Protocol 6 are members of NATO.¹¹⁰

¹⁰²American Declaration of Rights and Duties of Man, May 2, 1948. The members of the Council of Europe are Austria, Belgium, Cyprus, Denmark, France, West Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

¹⁰³See generally European Convention, *supra* note 100.

¹⁰⁴*Id.*

¹⁰⁵Parties to the NATO SOFA include all members of NATO except Iceland, Italy, and Spain. Members of NATO are Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, United Kingdom, United States, Turkey, Greece, West Germany, and Spain. Welton, *supra* note 11, at note 49.

¹⁰⁶"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, *supra* note 100, art. 2(1).

¹⁰⁷*Id.* art. 3.

¹⁰⁸Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, April 28, 1988, E.T.S. 114. "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." *Id.* art. 1. "A state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war" *Id.* art. 2.

¹⁰⁹As of 1989, there were 13 parties to Protocol No. 6. *Soering Case*, *supra* note 4, at para. 102. Those parties include, among others, The Netherlands, Austria, Denmark, Luxembourg, Spain, Sweden, Iceland, and Switzerland. 5 Yearbook of European Law 343 (1985); 7 Yearbook of European Law 362 (1987); The Netherlands Yearbook of International Law 322 (1987).

¹¹⁰Those parties are, among others, The Netherlands, Denmark, Luxembourg, Spain, and Iceland.

An individual who alleges a violation of the Convention cannot simply file a petition to be heard before the European Court of Human Rights.¹¹¹ Not all members of the Council of Europe accept the right of individual petition, although all the members of NATO that have ratified the Convention have also accepted the right of individual petition.¹¹² However, the right of individual petition means only that an individual can petition the European Commission of Human Rights after first exhausting domestic remedies.¹¹³ Only the Commission itself or a state party to the European Convention can request the European Court of Human Rights to hear the case; an individual cannot.¹¹⁴

Under the Convention the contracting parties agree to secure to "everyone within their jurisdiction" the rights contained in the Convention.¹¹⁵ As a result, it would seem that all the members of NATO that have ratified the Convention are obliged to secure rights guaranteed under the Convention to everyone within their jurisdiction, including the forces of a sending state stationed in their territory, even if the sending state has not ratified the Convention. How the rights guaranteed under the European Convention might be applied to a U.S. military member stationed in Europe is illustrated by the *Soering* case, a 1989 extradition case decided by the European Court of Human Rights.¹¹⁶ Although the accused was not a military member and the case involved an extradition treaty rather than the NATO SOFA, it nevertheless illustrates how the European Convention might affect the ability of the U.S. military to prosecute a potential death penalty case in those NATO countries that have ratified the Convention.

B. THE SOERING CASE

Mr. Jens Soering is a German national who was in custody in Great Britain pending extradition to the United States on charges of murder in the State of Virginia.¹¹⁷ The extradition treaty in force between

¹¹¹European Convention, *supra* note 100, art. 48.

¹¹²Only Malta and Cyprus have not accepted the right of individual petition.

¹¹³European Convention, *supra* note 100, arts. 25 and 26.

¹¹⁴*Id.* art. 48. For a discussion, by one of its judges, of the European Court of Human Rights and how the decisions of the court can effectively invalidate domestic law, see generally Walsh, *Protecting Citizens from their own Countries: How the European Court of Human Rights Affects Domestic Laws and Personal Liberties*, 15 Hum. Rts. 20.

¹¹⁵European Convention, *supra* note 100, art. 1.

¹¹⁶*Soering Case*, *supra* note 4.

¹¹⁷*Id.* See *infra* note 151. Soering, the 23-year old son of a West German diplomat, was accused of murdering his American girlfriend's parents in their Bedford County, Virginia, home in 1985. Wash. Post, June 22, 1990, at D1, col. 1.

the United States and Great Britain contains a provision common to many of the extradition treaties in force for the United States.¹¹⁸ The treaty provides that if the offense for which extradition is requested is punishable by death in the requesting state but not in the requested state, then extradition may be refused unless the requesting party gives assurances satisfactory to the requested state that the death penalty will not be carried out.¹¹⁹ The death penalty was abolished in the U.K.¹²⁰ The attorney for Bedford County, Virginia, certified to the government of the United Kingdom that if Soering were convicted of capital murder, a representation would be made to the judge in the name of the United Kingdom that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.¹²¹ This is the form of certification that the U.K. accepted without protest in the past.¹²² No fugitive extradited to the U.S. from the U.K. after such a representation has been executed.¹²³

Soering did not attack the death penalty directly. Instead, he alleged that by extraditing him to the U.S. where he might be subjected to the "death row phenomenon," Great Britain would violate its obligation under article 3 of the European Convention, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.¹²⁴

Soering's complaint was not against the United States, because, as a nonparty to the Convention, the U.S. has no obligations under it.¹²⁵ Instead, his complaint was against Great Britain with respect to its obligations under the Convention. As interpreted by the European Court of Human Rights, that obligation extended to not surrendering Soering to the U.S. where he might become subject to the "death row phenomenon," which the court said violated article 3 of the Convention.¹²⁶ Thus, the interests of the United States were affected by

¹¹⁸Soering case, *supra* note 4, para. 36. See generally M. Bassiouni, International Extradition and World Order (1974); and S. Bedi, Extradition in International Law and Practice (1966). The United States has entered into 96 bilateral extradition treaties, some dating as far back as the mid-1800's. See 18 U.S.C. § 3181 (1988) for list of countries.

¹¹⁹Soering Case, *supra* note 4, para. 15.

¹²⁰*Id.*

¹²¹*Id.* para. 20.

¹²²*Id.* para. 37.

¹²³*Id.* However, the effectiveness of the undertaking has never been tested. *Id.*

¹²⁴European Convention, *supra* note 100. See *infra* text accompanying notes 133, 134.

¹²⁵Soering Case, *supra* note 4, paras. 86 and 91. For a discussion of the general principle of international law that treaties do not create obligations on nonparties without their consent, see Restatement of the Law Third: The Foreign Relations Law of the United States § 324.

¹²⁶Soering Case, *supra* note 4, para. 91.

the possibly conflicting treaty obligations of the U.K. under its extradition treaty with the U.S. and under the European Convention. Similarly, as we shall see, the interests of the U.S. military could be affected by a receiving state's possibly conflicting treaty obligations under the NATO SOFA and the European Convention.¹²⁷

The *Soering* case reached the European Court of Human Rights after Soering's individual petition to the European Commission resulted in an opinion by the Commission that there was no breach to article 3 of the Convention relating to inhuman or degrading treatment, but that there was a breach of an article unrelated to the issues discussed in this article.¹²⁸ The Commission then brought the case before the European Court of Human Rights. The United Kingdom asked the court to find among other things that extradition of Soering would not breach article 3.¹²⁹

The European Court of Human Rights held that, although the European Convention did not prohibit the death penalty itself, exposing Soering to the risk of the "death row phenomenon" would be to expose him to "treatment going beyond the threshold set by Article 3" of the Convention.¹³⁰ By extraditing Soering, then, the United Kingdom would violate its obligations under the European Convention, despite the United Kingdom's contention that surrendering a fugitive does not amount to subjecting him to whatever treatment or punishment he will receive after conviction and sentence in the extraditing state.¹³¹ The court was also unpersuaded by arguments similar to the rationale of noninquiry that U.S. courts use in extradi-

¹²⁷See *infra* text accompanying notes 152-54.

¹²⁸*Id.* para. 78. The Commission's report expressed the opinion that there had been a breach of article 13 of the Convention (alleging that there was no effective remedy in the U.K. with respect to his complaint under article 3) but that there had not been a breach of article 3 nor of article 6 (alleging that upon extradition, Soering would be unable to secure legal representation since there was no legal aid for collateral challenges before federal courts). *Id.* In contrast, the European Court of Human Rights found that there would be a breach of article 3, but not article 6 nor article 13, if Soering were extradited. *Id.*

¹²⁹*Id.* para. 79.

¹³⁰*Id.* para. 105. In its holding, the court did not forbid extradition to the United States; it only held that by doing so the United Kingdom would violate its obligations under the Convention. *Id.* paras. 111 and 126. After the decision of the court, the U.K. decided to extradite Soering for crimes to which the death penalty will not apply. 5 Int'l Enforcement L. Rep. 347.

¹³¹*Id.* para. 83.

tion hearings.¹³² For example, the U.K. argued that not only did the holding interfere with international treaty rights, but also that it conflicted with international judicial process, delved into the internal affairs of foreign states not parties to the Convention, and entailed difficult evaluations of alien systems of law and conditions in foreign states.¹³³

In deciding that the “death row phenomenon” violated article 3 of the Convention, the court looked into such matters as the length of detention prior to execution, the conditions on death row, and the applicant’s age and mental state.¹³⁴ Soering’s application cited the delays involved in the appeal and review of his case if the death penalty were adjudged; increasing tension and psychological trauma; the conditions on death row in the prison where he would expect to be held, including the expectation that he would be subjected to violence and sexual abuse because of his age, color, and nationality; and the constant specter of the execution itself, including the ritual of execution.¹³⁵ With respect to the conditions on death row, the court relied on evidence uncontested by the United Kingdom and said it did not find it necessary to pass on the reliability of the risk of violence and homosexual abuse.¹³⁶ Instead, it concerned itself with the conditions associated with extra security for death row prisoners

¹³²U.S. courts with extradition cases before them generally start from a position known as noninquiry. *See generally* Kester, *Some Myths & United States Extradition Law*, 76 Geo. L. Rev. 1441. U.S. courts consistently hold that they will not look into the internal legal procedures in store for the person to be extradited because to do so would conflict with the principle of comity. *See Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983). *See also* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985). Once an extradition decision is made, a U.S. court generally will not disturb it, as long as the decision was not based on a constitutionally impermissible factor, such as race, color, sex, national origin, religion, or political beliefs. *See Matter of Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984). U.S. courts suggest that they would disturb extradition decisions if they involved “particularly atrocious procedures or punishments” in foreign jurisdictions and that they can imagine procedures or punishments “so antipathetic to a federal court’s sense of decency” that they would have to reconsider the doctrine on noninquiry. *See id.* *See also* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). However, that exception never has been used. *See Arnbjornsdottir-Mendler v. U.S.*, *supra*.

The reluctance of U.S. courts to “supervise another nation’s judicial system” or to look at the procedures that would apply after extradition is in sharp contrast with the European Court of Human Rights’ treatment in the *Soering* case of the U.S. judicial system and death row prison conditions. *See Demjanjuk v. Petrovsky*, *supra*. *See also* Gallina v. Fraser, *supra*. *See Soering Case*, *supra* note 4.

¹³³*Soering Case*, *supra* note 4, at para. 83.

¹³⁴*Id.* paras. 105-108.

¹³⁵*Id.* para. 64.

¹³⁶*Id.* para. 107.

that, although justifiable in principle, lasted on average for six to eight years.¹³⁷

Two evidentiary aspects of the court's reasoning are particularly interesting. The first concerns the court's acceptance as part of the "death row phenomenon" the "anguish and mounting tension of living in the ever-present shadow of death,"¹³⁸ even though the court said it did not find it necessary to determine the reliability of the applicant-adduced but strongly contested evidence of the "extreme stress, psychological deterioration, and risk of homosexual abuse and physical attack undergone by prisoners on death row."¹³⁹ Except for evidence as to his state of mind at the time the murders were committed,¹⁴⁰ the only psychiatric evidence discussed in the opinion concerned an evaluation that Soering's dread of violence and homosexual abuse on death row were having a profound psychiatric effect on him.¹⁴¹ Yet, the court seemed to accept that "anguish and mounting tension of living in the ever-present shadow of death"¹⁴² existed

¹³⁷*Id.* Cf. U.S. military death row practice. The last U.S. military execution took place in 1961 for the offenses of rape and attempted murder committed in 1955. Between 1950 and 1961, there were a total of 13 executions of U.S. Army and Air Force members combined: 9 for murder, 3 for murder and rape, and 1 for rape alone. See statistics maintained at the Office of The Judge Advocate General, U.S. Army. The average time from sentence to execution was roughly comparable to the six years in Virginia discussed in the Soering case. *Id.* Before a case can be tried as capital in a U.S. court-martial, the offense must be one of the four crimes for which capital punishment is authorized in peacetime: murder, rape, mutiny or sedition, or espionage. See Manual For Courts-Martial, United States, 1984, at paras. 43.46, 18.28, 25, and 23 [hereinafter MCM]. In addition, the Convening Authority must find the existence of one or more specifically enumerated aggravating factors. *Id.* at R.C.M. 1004(b). Even if sufficient aggravating factors are found to exist, the case can still be referred as noncapital. In a case referred capital, the accused may not plead guilty. *Id.* at R.C.M. 910(a). A capital case must be tried before a court panel, whereas in noncapital cases, the accused may request trial by judge alone. *Id.* at R.C.M. 231(f)(1)(c). In order to sentence the accused to capital punishment during the sentencing portion of the bifurcated proceeding, the finding of guilty must have been unanimous, rather than by the two-thirds vote otherwise sufficient for conviction. *Id.* at R.C.W. 1004. In addition, the panel must unanimously find the existence of the aggravating factors alleged. *Id.* During the review process, the Convening Authority may disapprove the capital sentence. *Id.* at R.C.M. 1112. The appellate hierarchy for military courts-martial is the Court of Military Review of the service concerned; the Court of Military Appeals; and then the U.S. Supreme Court. *Id.* at R.C.M. 1203 and 1205. In addition, the Secretary of Defense or the President of the United States will review cases in which capital punishment has been adjudged. *Id.* at R.C.M. 1206 and 1207. Finally, a sentence of death may not be executed unless approved by the President of the United States. *Id.* at R.C.M. 1207. Because of the rigorous safeguards built into court-martial review and appellate procedures, there is no reason to suppose future military executions would take place any faster than they did in 1961.

¹³⁸*Soering Case*, *supra* note 4, at para. 106.

¹³⁹*Id.* para. 107.

¹⁴⁰*Id.* para. 21.

¹⁴¹*Id.* para. 25.

¹⁴²*Id.* paras. 106-107.

and amounted to inhuman or degrading treatment.¹⁴³ If the court did not consider the applicant-adduced evidence of extreme stress and psychological deterioration, then it is difficult to determine what evidence the court used to decide that such stress constituted inhuman treatment so onerous that merely surrendering a fugitive to possible exposure violated the European Convention. Presumably, the standard the court used could be rebutted by evidence that the longer the time between sentencing and execution of the death penalty, the less anxiety and tension there is for prisoners who know the execution will not take place until years hence.

By basing its decision not on the death penalty itself but on prison conditions, the court also may have opened the door to petitions for relief from extradition, even in noncapital cases, based on the prison conditions discussed in this case, such as cell size, amount of recreation, procedures under maximum security conditions, and risks of violence and homosexual attack.¹⁴⁴ Those conditions could conceivably apply to any prisoner in any maximum security prison, whether on death row or not. As a result, the European Court of Human Rights could conceivably affect NATO SOFA jurisdictional issues even in noncapital cases, particularly where the accused might be treated as a juvenile under receiving state law.

Germany's position in the *Sowing* case is particularly relevant in light of the Federal Republic of Germany's involvement in the NATO SOFA cases discussed earlier in this article.¹⁴⁵ Germany, which has abolished the death penalty, opposed the extradition request of the United States and asked the U.K. for extradition to Germany based on Soering's nationality, even though the crucial U.S. witnesses cannot be compelled to testify in a German court.¹⁴⁶ The German Government represented to the European Court of Human Rights that the form of assurance the U.S. gave to the U.K. with respect to carrying out the death penalty would be insufficient for Germany to extradite a fugitive under Germany's extradition treaty with the U.S.¹⁴⁷ It was Germany's position, unlike that of the U.K., that article 3 prohibited not only causing inhuman treatment, but also putting a person in a position where he may suffer such treatment.¹⁴⁸ The holding by the European Court in this case gives Germany a second prong with

¹⁴³*Id.* para. 111.

¹⁴⁴*Id.* paras. 100-111

¹⁴⁵*Id.* para. 105.

¹⁴⁶*Id.* para. 70.

¹⁴⁷*Id.* para. 75.

¹⁴⁸*Id.* para. 82.

which to manifest its distaste for the death penalty in future recall of waiver cases.¹⁴⁹ Distaste for the death penalty can in the future be couched as an obligation to prevent inhuman "death row phenomenon" treatment.

The decision in the *Sowing* case would appear to put Great Britain in the position of either having to breach its obligation to the United States under the extradition treaty or to breach its obligation under the European Convention. In this case, however, the European Court of Human Rights held that refusal to extradite would not breach the extradition treaty, because that treaty permitted refusal to extradite unless the requesting party gave adequate assurances that the death penalty would not be carried out.¹⁵⁰ The court said the United States certification in the *Sowing* case fell short of adequate assurances.¹⁵¹

Unlike extradition treaties, however, the **NATO SOFA** does not have an "adequate assurance" method of opting out of its jurisdictional provisions where the death penalty is concerned.¹⁵² Therefore, if a **NATO** receiving state were to go before the European Court of Human Rights on behalf of a U.S. military accused alleging that to turn the accused over to the U.S. would violate that receiving state's obligations under article 3 of the European Convention, the conflict between treaties would be direct. Thus, complying with the provisions of one treaty could cause the other treaty to be breached. Even a successful rebuttal to the "death row phenomenon" as an article 3 violation still leaves open the possibility of a direct conflict between treaty obligations for those **NATO** countries that have ratified Protocol 6 to the European Convention.¹⁵³ That assumes the European Court holds, as in *Soering*, that the violation comes from the act of turning over a person who then becomes subject to treatment prohibited under the convention.¹⁵⁴

¹⁴⁹See *infra* text accompanying notes 58-86.

¹⁵⁰*Id.* arts. 97-98.

¹⁵¹*Id.* A diplomatic agreement subsequently reduced the charges against *Soering* from capital murder to first degree murder, which, in Virginia, carries a maximum sentence of life imprisonment. *Soering* was extradited to Virginia, where he was tried for the murders, and on June 21, 1990, he was sentenced to two life terms in prison. Wash. Post, June 22, 1990, at D1, col. 1.

¹⁵²**NATO SOFA**, *supra* note 2.

¹⁵³See Protocol No. 6, *supra* note 108.

¹⁵⁴*Soering Case*, *supra* note 4.

IV. PRINCIPLES OF TREATY CONSTRUCTION

The cases discussed above require us to examine the legal issues that arise under the following circumstances: 1) when there are conflicts between obligations under a domestic constitution or other domestic legislation and a treaty such as the **NATO SOFA**; and 2) when there are conflicts between obligations under a prior treaty and a subsequent treaty.

A. CONFLICTS BETWEEN DOMESTIC LAW AND TREATY OBLIGATIONS

Several parties to the NATO SOFA have domestic constitutional provisions that bar the death penalty.¹⁵⁵ Some other parties to the NATO SOFA prohibit the death penalty through legislation.¹⁵⁶ Under the concept of *pacta sunt servanda*, it is a basic tenet of international law that nations that have entered into treaties are obliged to give them effect.¹⁵⁷ On the international plane, the fact that a treaty may conflict with domestic legal considerations does not excuse a country from its international obligations under the treaty.¹⁵⁸ However, domestic law may provide otherwise.

In the United States, for example, both treaties and legislation are the supreme law of the land.¹⁵⁹ The U.S. Constitution does not give either one a higher rank than the other.¹⁶⁰ When a treaty conflicts with U.S. law, U.S. courts have generally tried to reconcile the conflicting provisions to give effect to both, unless it is clear that domestic legislation is intended to override the treaty, in which case the later-in-time-rule prevails.¹⁶¹ However, because of the supremacy of

¹⁵⁵For example, Portugal, Belgium, Luxembourg, Italy, Spain, Germany, and The Netherlands all have constitutional provisions that bar the death penalty. See *Constitutions of the Countries of the World* (1985).

¹⁵⁶For example, Luxembourg abolished the death penalty by legislation in 1979. However, the House of Parliament defeated a proposal to put the abolition in the constitution. See 9 *Constitutions of the Countries of the World* 10 (1985).

¹⁵⁷Vienna Convention on the Law of Treaties, May 22, 1969, art. 26 [hereinafter *Vienna Convention*]. The United States is not party to the Vienna Convention; however, approximately 60 states are party. Its substantive rules generally are regarded as representing customary international law. See *Interpretation of Treaties*, 75 A.J.I.L. 147 (1981).

¹⁵⁸Vienna Convention, art. 27.

¹⁵⁹U.S. Const. art. VI, cl. 2.

¹⁶⁰*Id.*

¹⁶¹For an extreme example of a domestic court's reconciliation of a U.S. treaty obligation and subsequent U.S. legislation, see *United States v. The Palestine Liberation Organization*, 695 F. Supp. 1458 (S.D.N.Y. 1988). "[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid v. Covert*, 354 U.S. 1, 18 (1957).

the U.S. Constitution, courts do not attempt to reconcile treaty provisions nor legislation that is at odds with U.S. constitutional protections.¹⁶² Thus, in the United States, the hierarchy of precedence is 1) the Constitution and 2) on a lower plane but equal to each other, legislation and treaties. It is worth remembering that it was because of a conflict between the provisions of international agreements and U.S. constitutional guarantees that the U.S. military no longer tries civilian military dependents by court martial for crimes committed overseas.¹⁶³

Other countries do not necessarily use the same hierarchy when there are conflicts between their constitutions or domestic legislation and treaty obligations. For example, the Constitution of The Netherlands allows a treaty that conflicts with its constitution to "take effect," and thus presumably prevail, providing that the treaty is approved by at least a two-thirds vote of the Chambers of the States General.¹⁶⁴ The Constitution of The Netherlands also provides that when domestic legislation conflicts with a treaty, the domestic legislation does not apply.¹⁶⁵

It seems clear, then, that nations use their domestic law to decide how to resolve conflicts between their laws and treaty provisions, even if the hierarchical principles they use are not the same. To determine how a NATO receiving state's courts would resolve conflicts between that state's domestic law and the NATO SOFA would require a careful analysis of each receiving state's constitution, or equivalent, and legislation, as interpreted by its own courts.

B. CONFLICTS BETWEEN TWO TREATIES

When two treaties conflict, domestic law has less relevance than principles of international law in deciding how to resolve the conflict. International law principles of construction would govern in potential U.S. military death penalty cases where a receiving state's prohibition against the death penalty arises from its ratification of Optional Protocol No. 6 to the European Convention.¹⁶⁶

¹⁶²*See* Reid v. Covert, 354 U.S. at 18.

¹⁶³*Id.*

¹⁶⁴*See* Constitution of the Kingdom of the Netherlands, 10 Constitutions of the Countries of the World (1984), art. 91.

¹⁶⁵*Id.* art. 94.

¹⁶⁶*See infra* text accompanying notes 104-10.

The Vienna Convention on the Law of Treaties is generally recognized as embodying customary law with respect to treaties.¹⁶⁷ When there are subsequent treaties on the same subject matter, the Vienna Convention provides for different rules of construction depending on who the parties are to the treaties.¹⁶⁸ Under article 30 of the Vienna Convention, if the parties to the first and second treaties are the same, they are bound by the later treaty, unless the treaty provides otherwise.¹⁶⁹ If the parties to the treaties are not the same, then for those who are the parties to the first treaty but not the second, their treaty relations are governed by provisions of the former treaty. ~ This is the case that exists with respect to the parties to the NATO SOFA, the European Convention, and Optional Protocol No. 6. They are not the same parties, because the U.S. is not party to the European Convention nor Optional Protocol No. 6. However, the principles of article 30 to the Vienna Convention apply only to treaties that relate to the same subject matter.¹⁷¹ It is not entirely clear whether "the same subject matter" of article 30 refers only to entire treaties dealing with the same subject matter or whether it might also apply to provisions concerning the same subject matter in treaties that, as a whole, pertain to different matters. If article 30 applied to the latter, the jurisdictional provisions of the NATO SOFA, rather than any conflicting provisions of Protocol No. 6 to the European Convention, would govern the treaty relations between the United States and a NATO receiving state that has ratified Protocol No. 6.¹⁷² However, that would not excuse the European receiving state from its obligations to the parties to Protocol No. 6 of the European Convention.¹⁷³ Therefore, whether or not article 30 of the Vienna Convention applies to conflicting provisions of the NATO SOFA and Protocol No. 6, the receiving state can end up in the same position where complying with one treaty puts the state in breach of the other treaty.

As a result, it appears likely that in cases arising in Europe in which complying with one treaty, such as the European Convention and Protocol No. 6, leads to the abrogation of another treaty, such as the

¹⁶⁷Vienna Convention, *supra* note 157. Restatement of the Law Third: The Foreign Relations Law of the United States, § 102, comment f.

¹⁶⁸Vienna Convention, *supra* note 157, art. 30.

¹⁶⁹*Id.* art. 30, subpara. 3.

¹⁷⁰*Id.* art. 30, subpara. 4(b).

¹⁷¹*Id.*

¹⁷²*See infra* text accompanying notes 104-10.

¹⁷³The Vienna Convention does not provide for excusing performance when the obligations under one treaty conflict with obligations under another treaty. *See generally* Vienna Convention, *supra* note 157.

NATO SOFA or an extradition treaty, the European courts will be faced with a construction decision where there is no clear principle of international law as guidance.¹⁷⁴ In determining which obligation the state must satisfy in death penalty cases, emerging trends in human rights law as embodied in the European Convention and Protocol No. 6, as well as domestic abolitions of the death penalty, are likely to weigh heavily.¹⁷⁵

V. THE DEATH PENALTY IN THE NATO JURISDICTIONAL SCHEME

The European states that are parties to the NATO SOFA are bound by the European Convention to adopt effective remedies for violations of the Convention's rights.¹⁷⁶ Consequently, decisions of the European Court of Human Rights and those of European national courts that implement those rights are highly relevant to U.S. military personnel stationed in Europe.

¹⁷⁴An illustration of the reasoning used to try to resolve this dilemma occurred in the *Short* case discussed *supra* at text accompanying notes 94-98. The Attorney General in The Netherlands issued an opinion in the *Short* case in which he considered whether there was a way to establish a hierarchy of commitments between the NATO SOFA and Protocol No. 6 in the European Convention. It was his opinion that neither the Vienna Convention nor any other principle of international law governed. Further, it was his opinion that the irreconcilable differences of the two different obligations then gave The Netherlands the choice as to which obligation to satisfy. Translation of Special Attorney General Strikwerda's opinion of January 26, 1990, to the Dutch Supreme Court, maintained in the files of The Judge Advocate General, U.S. Army.

On March 30, 1990, The Netherlands Supreme Court ruled that the conflicting NATO SOFA and Protocol No. 6 obligations were mutually exclusive. It balanced the interest of Short not being exposed to the death penalty against the state's interest in carrying out its NATO SOFA obligations. The court found Short's interest to predominate and ruled that he could not be turned over to American authorities unless the U.S. provided a written guarantee that either a possible death sentence would not be carried out or that Short would not be prosecuted for a crime carrying the death penalty. Diplomatic Note, April 4, 1990, transmitted by the Dutch Embassy to State Department, subject: March 30, 1990, Netherlands Supreme Court Decision, Charles Donald Short v. Kingdom of The Netherlands. In June 1990, U.S. and Dutch authorities agreed on an arrangement whereby Short would submit to a U.S. military article 32 pretrial investigation and a psychiatric evaluation while technically remaining in Dutch custody. If the U.S. court-martial convening authority determined not to refer the case as a capital case, the Dutch then would release custody to the United States. Telecommunications Message from AMEMBASSY THE HAGUE to SECSTATE Washington (U) (June 8, 1990), subject: SGT Short Murder Case: Psychiatric Evaluation: Status Report.

¹⁷⁵For a discussion of the contention that there has been a *de facto* abolition of the death penalty in all member states of the Council of Europe, accomplished either by abolition or by nonuse of the penalty, see the *Soering* case, *supra* note 4, at paras. 101 and 102.

¹⁷⁶European Convention, *supra* note 100, art. 13 ("Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority . . .").

The *Soering* case, therefore, cannot be ignored. The fact that extradition in the *Sowing* case from the United Kingdom to the United States was barred not because the U.S. allows the death penalty,¹⁷⁷ but rather because of the “death row phenomenon,” is immaterial. The important message is the clear indication that European fora and human rights standards are available to prevent a transfer of an accused in a capital case from a European jurisdiction to the United States because of the prospect that he will be subjected in the U.S. to a punishment that is inhuman by European standards. While the European Court of Human Rights did not rule that the death penalty itself violates European human rights standards, its unmistakable implications extend to the availability of the death penalty because of the associated and, for the American judicial system, apparently inextricable, “death row phenomenon.”¹⁷⁸ Ironically, in this respect, the court’s opinion appears to require speedy execution in order to cure this defect in the human rights standards applied by the United States justice system.¹⁷⁹

Logic similar to the European court’s in the *Sowing* case also prevents a transfer of jurisdiction in the military setting where the accused is an American military member who is stationed in the European host state. Recall that the aggrieved party does not have to be a national of the European state for the European Human Rights Convention and its protections to apply.¹⁸⁰ If *Soering*, then, had been an American citizen, the European Court similarly could have prevented extradition. Suppose that *Soering* also was a U.S.

¹⁷⁷Capital punishment is not unconstitutional per se. *Gregg v. Georgia*, 428 U.S. 153 (1976); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷⁸Thirty-seven U.S. states have death penalty laws. From a peak of 199 executions in 1933, executions slowly dropped to an average of about 50 per year in the late 1950’s. Recently, the number of executions dropped from 25 in 1987 to 11 in 1988. In 1989, 14 people were executed as of November. Meanwhile, 2,210 inmates are on death row, with another 75 to 200 added each year. The time from conviction and sentencing to execution averages about eight years, and some prisoners spend more than 14 years fighting execution. *Wash. Post*, Nov. 6, 1989, at A4, col. 1. *See Vital Statistics: Updating the Death Penalty*, *Newsweek*, Nov. 6, 1989, at 8.

¹⁷⁹The “defect” is unlikely to be cured in the immediate future. *Id.* The last U.S. military execution was Private First Class John A. Bennett, U.S. Forces Austria, on April 13, 1961, at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, by hanging. He was sentenced on February 8, 1955, following a conviction for rape and attempted murder. The period of time from sentencing to execution in his case was 6 years, 2 months, and 6 days. There have been 13 Army and Air Force executions since 1950 (10 Army, 3 Air Force): 9 murders, 3 murder-rapes, and 1 rape. Currently, 2 soldiers await execution on death row at Ft. Leavenworth. Their average waiting period is 7 years. Multiple sources, Office of The Judge Advocate General, United States Army.

¹⁸⁰*See supra* text accompanying notes 115-16.

military member stationed in Britain; the European Court still could have effectively prevented extradition, even though the crime occurred in the United States, because of United Kingdom complicity in allowing the individual to be subjected to the inhuman "death row phenomenon." An even stronger case exists for extending this logic to prevent U.S. military authorities from exercising jurisdiction over a capital crime committed by one of its military personnel in the European state's territory. In that case, both the U.S. military authorities and the host nation have a practical interest in seeing that justice is served, albeit for sometimes quite different reasons.¹⁸¹ The latter is precisely the commonly encountered situation in capital criminal cases involving U.S. military accuseds on host nation territory.

The European Convention system is not the only avenue providing relief from the death penalty for the military member. They also have available European host nation justice systems where even more stringent domestic laws may prohibit the death penalty.¹⁸² National courts are particularly relevant in view of the bar against individual grievances in the European Convention system until domestic remedies first are exhausted.¹⁸³ Nevertheless, European Human Rights Court cases like *Sowing* may encourage previously reluctant European national systems to apply more actively their own or European Convention human rights standards to particular cases involving U.S. military personnel who are accused of capital offenses in order to deny jurisdiction to U.S. military courts.

¹⁸¹The U.S. military has the interest primarily because the accused is a U.S. soldier, and thereby a United States responsibility and also because administration of justice is essential to maintenance of discipline. The host nation has an interest primarily because it is essential to the maintenance of an ordered society that anyone who commits a crime within its borders is punished. Where the victim also is a national of the host nation, the state's interest is enhanced further, because one of the chief purposes for government is to provide a safe and secure environment for its citizens through the state's protections. *See, e.g.*, S. Lazareff, *supra* note 6, at 160-61.

¹⁸²*See, e.g.*, Grundgesetz (German Basic Law), art. 102. This declaration of the fundamental value of human life is regarded in the Federal Republic of Germany as abolishing the death penalty. Although some European states, Turkey, for example, still have death penalty provisions, a gradually developed "European standard" now no longer permits imposition of the penalty. Although the European Human Rights Court has not reached the question, article 2 of the European Human Rights Convention, which clearly permits the death penalty under certain conditions, may have been superseded by the later practice of European member states. Judge Rudolf Bernhardt, European Court of Human Rights Remarks at a meeting of the International Law Society, National Law Center, George Washington University (October, 1989).

¹⁸³European Convention, art. 27(3). *See, e.g.*, T. Buergenthal, International Human Rights 93-98 (1988).

VI. CONCLUSION

The conflict with European NATO allies over imposition of the death penalty by U.S. military courts sitting on European soil is but one source of irritation in alliance relations. Europe is in an age of immense political and economic change; while Western Europe is proceeding rapidly toward economic integration, the socialist monolith in Eastern Europe is experiencing even more rapid changes that are challenging the traditionally held concepts of eastern bloc political and economic sluggishness. Consequently, growing European identity, pride, and concern for the environment, plus an increasing Western European consensus of a diminished hostile military threat to Western Europe from the east, prompt re-examination of the amounts and kinds of resources that are committed to defense. The United States, as the largest sending state in NATO, will be the focus of much of the re-examination. Resulting changes in the status quo pertaining to the stationing of U.S. forces in Europe will necessarily exacerbate tensions in those matters where European NATO states feel their sovereign interests are affected most.

The death penalty is a highly visible issue; and the United States cannot benefit in its relations with host nations from additional tensions resulting from divergent views about the death penalty. As opposition to the death penalty increasingly becomes to Europeans an aspect of their fundamental sovereign interests, the United States will be forced to make some policy choices. Will the U.S. continue to regard its current policy of strict application to capital cases of the exercise of jurisdiction provisions of the NATO SOFA as something that is essential to the activities of U.S. military forces in Europe—and particularly to overall U.S. administration of military justice? Or is this an area where some flexibility in U.S. policies may be required in view of the need to respect a matter of particular host nation sensitivity in the interests of maintaining friendly cooperation within the alliance?

Even outside the NATO alliance, the tenor of U.S. responses to NATO receiving state views on the death penalty could propel the issue to the forefront of continuing base rights negotiations. Within NATO, renewals of politically sensitive U.S. stationing agreements with states on NATO's periphery, such as, for example, Greece, Spain, Italy and Turkey, could be affected. As the U.S. position regarding the death penalty is seen as increasingly out of step with the practices of other sending states, potential NATO receiving states may find the role of host to U.S. forces politically unattractive.

For the time being, the cases illustrate that European authorities for the most part are seeking some method for preventing U.S. military imposition of the death penalty within the general framework of existing jurisdictional arrangements. Although some critics call for "renegotiation" of the NATO SOFA and its jurisdictional arrangements in order to reassert European sovereign interests,¹⁸⁴ there is little likelihood that these agreements will be amended in the foreseeable future.¹⁸⁵ Amendments to the agreements that somehow make the foreign criminal jurisdiction scheme subject to European domestic and regional human rights legislation and judicial decisions are untenable for several reasons. It would create uncertainty for sending states forces as they move between jurisdictions. It would mean that domestic sentencing statutes are hostage to changing foreign attitudes regarding the death penalty. If the U.S. were forced to adapt its military death penalty scheme to take account of European prohibitions, U.S. military personnel stationed in Europe would have an unequal benefit *vis a vis* European standards, whereas military personnel stationed elsewhere would remain subject to U.S. death penalty standards. Uniform application of clear military justice standards is an element in the U.S. policy of equal treatment for all military personnel and an essential precondition for the effective administration of military justice and discipline.

The *Soering* and *Short* cases illustrated all too well that, where the death penalty is at issue, individual accuseds might not permit host nations to ignore European principles against the death penalty. Ultimately, the U.S. may have to decide whether it is better for individual soldiers, in effect, to bypass the tested machinery of negotiation that hitherto resolved exercise of jurisdiction problems by seeking court orders blocking the transfer of jurisdiction in individual cases, or whether it is preferable that some new machinery that takes into account European sensitivities about the death penalty is devised so that predictability of results can be regained in practice.

¹⁸⁴See *supra* note 58.

¹⁸⁵Since its conclusion in 1951, the NATO SOFA has not been amended. No party appears willing to press for amendment of any portion of the agreement out of fear that the entire agreement then will be reopened for examination. The uncertainty resulting from opening "Pandora's box" is much less attractive than the relative stability brought by the agreement in its original form. See Welton, *supra* note 11, at 114-16.

PRESIDENTIAL AUTHORITY TO DISPLACE CUSTOMARY INTERNATIONAL LAW

by Major Richard Pregent*

I. INTRODUCTION

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.¹

On June 21, 1989, the Department of Justice (DOJ) issued an opinion setting forth the President's authority to order the Federal Bureau of Investigation (FBI) to arrest an individual for violations of United States law in a foreign country without that country's consent.² This opinion reversed the position taken by DOJ on this same issue in March 1980, at the end of the Carter Administration.³ Both opinions were detailed analyses of the FBI's statutory authority to investigate⁴ and to arrest.⁵

The 1980 opinion was written by John Harmon and concluded, in part, that "[a]lthough the question is not free from doubt, we conclude that the Bureau [FBI] only has lawful authority [to seize an

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¹J. Brierly, *The Law of Nations* 162 (6th ed. 1963).

²This opinion has not been published. For a general explanation of the opinion see Statement of William Barr (Ass't Attorney General, Office of Legal Counsel, U.S. Dep't of Justice), *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 101st Cong., 1st Sess. (1989) [hereinafter W. Barr]. See also Statement of Abraham Sofaer (The Legal Advisor, U.S. Dep't of State), *The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 101st Cong., 1st Sess. (1989).

³U.S. Dep't of Justice, *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. O.L.C. 543 (1980).

⁴28 U.S.C. § 533(1) (1982).

⁵18 U.S.C. § 3052 (1988).

individual in a foreign country for violations of United States laws] when the asylum state acquiesces to the proposed operation.’’⁶ The opinion referred to a rule of statutory construction that would provide “all reasonable and necessary means” for a government official to carry out a statutorily imposed duty.⁷ Harmon concluded, however, that it would not be “reasonable” to assume the Congress contemplated the violation of international law when it authorized the FBI to conduct arrests.⁸

The 1980 DOJ opinion also relied on a second analytical basis, case law. Harmon quoted Chief Justice Marshall’s opinion in *Schooner Exchange v. McFadden*:⁹ “All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other source.”¹⁰ Harmon implies that the United States, or any sovereign state for that matter, does not have the authority to violate the territorial integrity of another state. The result is that “the powers of the Bureau [FBI] are delimited by those of the enabling sovereign.”¹¹

William Barr, the author of the 1989 opinion, testified before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on November 8, 1989.¹² In his prepared statement, Barr conceded that seizing an individual charged with a violation of United States law within another state’s territory without that state’s approval would violate customary international law. Nevertheless, he asserted that “[u]nder our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law.”¹³ The 1989 DOJ opinion repudiated the 1980 DOJ opinion and the earlier opinion’s conclusion that the FBI’s authority to conduct forcible arrests beyond United States territory

⁶U.S. Dep’t of Justice, *supra* note 3, at 1.

⁷*Id.* at 14.

⁸*Id.* at 16.

⁹11 U.S. (7 Cranch) 116 (1812).

¹⁰*Id.* at 136.

¹¹U.S. Dep’t of Justice, *supra* note 3, at 15.

¹²William Barr, Assistant Attorney General, Office of the Legal Counsel; Abraham Sofaer, Legal Advisor, Department of State; and Oliver Revell, Associate Deputy Director-Investigation, FBI; all testified on the same day. The record of their testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess., November 8, 1989, has not been published. It is available for public inspection at room 806, House Annex Number One, Washington, D.C.

¹³W. Barr, *supra* note 2, at 4.

is limited by customary international law. Barr further testified that the authority to violate customary international law existed in the form of domestic case law, the Constitution, and recently enacted statutes.

The DOJ has refused to release the 1989 opinion.¹⁴ This makes a detailed critique difficult, but not impossible. Though the political ramifications of the current DOJ opinion are substantial, this analysis will focus only on the legal bases of the 1989 DOJ opinion and the even more basic question of whether domestic legal authority to violate international law is actually required to deal with fugitives from American justice.

11. ANALYSIS OF THE DOJ OPINION

A. DOMESTIC CASE LAW

The threshold question concerns the relationship of United States domestic law and customary international law. At one end of the analytical spectrum is the concept of monism.¹⁵ Under this analytical theory, both domestic and international law are part of a single legal system. If a conflict arises between domestic and international law, international law takes precedence. Domestic courts are compelled to enforce international law regardless of any contrary action by the state's executive or legislative branches.¹⁶ At the other end of the spectrum is dualism.¹⁷ This school of thought views domestic and international law as separate and distinct legal systems. The interrelationship between these systems within a given state is a question for domestic resolution.¹⁸ Quite clearly, the United States stands squarely in the dualism camp.

In his statement, Barr cites *Schooner Exchange v. McFadden*,¹⁹ the same case that DOJ relied on in the 1980 opinion, to demonstrate that customary international law does not serve as an absolute restriction on the United States' sovereign capacity to act. In *Schooner*, decided in 1812, the Supreme Court concluded that customary international law was indeed part of the domestic law of

¹⁴*Id.* at 3.

¹⁵I. Brownlie, *Principles of Public International Law* 33-36 (3d ed. 1979). See also Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 864-66 (1987).

¹⁶Henkin, *supra* note 15, at 864.

¹⁷*Id.* at 865.

¹⁸*Id.*

¹⁹11 U.S. (7 Cranch) 116 (1812).

the United States. Thus, a French warship was immunized from judicial process while in United States territorial waters in accordance with "the usages and received obligations of the civilized world,"²⁰ customary international law. The Court also pointed out, however, that a sovereign had the authority to displace customary international law within its borders.²¹

Barr also cites *Brown v. United States*.²² *Brown* involved the seizure of cargo from a ship taken in United States waters during the War of 1812. The Supreme Court found that customary international law applied to the controversy and ordered that restitution be made. The Court described customary international law as a "guide which the sovereign follows or abandons at his will."²³

These cases established that dualism is United States law; international law can be displaced domestically. Many issues remained to be settled, however. Left in doubt were the matters of the kind of international law that could be displaced, the governmental entities that could displace this law, and how this displacement might be accomplished.

Barr relies on *The Paquete Habana*²⁴ to demonstrate that the President has the authority to displace customary international law.²⁵ This case involved the seizure of private fishing vessels by the United States Navy during the Spanish-American War. The Supreme Court found that, under customary international law, these vessels should not have been seized, and the Court ordered the proceeds of their sale turned over to their original owners.²⁶

It is Barr's position that, in this case, the Court established a position for customary international law within the hierarchy of United States domestic law with the following language:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .²⁷

²⁰*Schooner Exchange*, 11 U.S. at 137.

²¹*Schooner Exchange*, 11 U.S. at 146.

²²12 U.S. (8 Cranch) 110 (1814).

²³*Brown*, 12 U.S. at 128.

²⁴175 U.S. 667 (1899).

²⁵W. Barr, *supra* note 2, at 5.

²⁶*Paquete Habana*, 175 U.S. at 714.

²⁷*Paquete Habana*, 175 U.S. at 700.

Barr contends that these words evidence the fact that the executive and legislative branches, "at least as respects our domestic law," can "supplant legal norms otherwise furnished by customary international law."²⁸

This same quotation is described as "opaque and ambiguous" dictum by Professor Louis Henkin.²⁹ The Supreme Court used this phrase nearly a century ago and has not addressed the issue since. Henkin points out that only one court relied on these words to subordinate customary international law to a "controlling executive or legislative act," and this occurred eighty-six years after *The Paquete Habana* decision.³⁰

The Paquete Habana was an offshoot of a series of Supreme Court cases decided at the end of the last century that wrestled with the displacement of international law within the United States.³¹ The *Chinese Exclusion Case*³² of 1889 was the last of these. It dealt with a congressional act³³ that barred the petitioner from returning to the United States and conflicted with prior treaties between the United States and China.³⁴ The Court gave effect to the act of Congress, and thus resolved the question of whether treaties could be displaced by congressional action.³⁵

In *The Paquete Habana* the Supreme Court found that the seizure of the vessels by a Navy admiral did not displace customary international law.³⁶ With the above vague language, however, the Court also implied that both Congress and the President did possess the authority to displace such law. Unfortunately, vague implications often lead to expansive inferences.

Citing *Tag v. Rogers*³⁷ and *The Over the Top*,³⁸ Barr contends that,

²⁸W. Barr, *supra* note 2, at 5.

²⁹L. Henkin, *supra* note 15, at 879.

³⁰*Id.* at 874.

³¹*Whitney v. Robertson*, 124 U.S. 190 (1880); *Head Money Cases*, 112 U.S. 580 (1884); *Chinese Exclusion Case*, 130 U.S. 581 (1889).

³²130 U.S. 581 (1889).

³³For a detailed review of the historical background that led to these restrictions on immigration and the specific acts involved see L. Henkin, *supra* note 15, at 854-56 & n.12.

³⁴*Treaty of Peace and Friendship*, July 3, 1844, United States-China, 8 Stat. 592; *Treaty of Peace and Friendship*, June 1858, United States-China, 12 Stat. 1023; *Additional Articles to the Treaty of Peace and Friendship of 1858*, July 28, 1868, United States-China, 16 Stat. 739. See generally *Chinese Exclusion Case*, 130 U.S. at 590-94.

³⁵*Chinese Exclusion Case*, 130 U.S. at 602.

³⁶*Paquete Habana*, 175 U.S. at 714.

³⁷267 F.2 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

³⁸5 F.2d 838 (D. Conn. 1925).

since *The Paquete Habana* decision, "the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law."³⁹ This is simply not true. Neither of the cited cases refers to the existence of any Executive authority to depart from customary international law.

Tag dealt with the confiscation by the Federal Government of property in a New York trust owned by a German national during World War II. This action was taken in accordance with the Trading with the Enemy Act,⁴⁰ but violated a preexisting treaty with Germany.⁴¹ The court concluded that Congress had the authority to displace this earlier treaty,⁴² a decision that was simply a reiteration of the reasoning set forth in the *Chinese Exclusion Case*.

The Over the Top was a 1925 district court case from Connecticut that involved the sale of alcohol in international waters off the United States coast, an act legal under customary international law.⁴³ The court found for the defendant, but, in dicta, also recognized that Congress had the authority to proscribe acts beyond the three nautical mile limit recognized by customary international law.⁴⁴ The court thus recognized once again that Congress had the authority to displace customary international law.⁴⁵

These cases were little more than variations on the judicial reasoning set forth in *Brown, Schooner*, *Chinese Exclusion*, and *Paquete Habana*. Contrary to Barr's position, they did not establish the authority of the Executive to depart from customary international law.

Garcia-Mir v. Meese,⁴⁶ a 1986 decision from the Eleventh Circuit, with certiorari denied by the Supreme Court, was the first and, to date, the only court decision concluding that the *President* can displace customary international law. The appellees in this case were Mariel Cuban refugees who were being detained indefinitely by the Federal Government. They argued that this "prolonged arbitrary

³⁹W. Barr, *supra* note 2, at 6.

⁴⁰50 U.S.C. app. § 39 (1982).

⁴¹Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923. United States-Germany, 44 Stat. 2132, *as amended*, 49 Stat. 3258 (1925).

⁴²*Tag*, 267 F.2d at 668.

⁴³*Over the Top*, 6 F.2d at 842.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

detention" violated customary international law.⁴⁷ The court never reached the merits of this issue. Based on the dictum of *Puquete Habana* referred to earlier, the court held that the President had the authority to act in violation of customary international law in this instance.⁴⁸

The significance of this decision is still uncertain. It is not a pronouncement from the Supreme Court. Also, it deals with immigration law, an area in which both domestic and international law have traditionally granted very broad authority to the Executive and sovereign.⁴⁹

Henkin criticizes the court's decision because of its failure to include a crucial caveat to its "extreme dualist position" that the President may "act in derogation of a principle of international law."⁵⁰ In his view, the President may do this only when he is acting "within his constitutional powers."⁵¹

Henkin believes *Garcia-Mir* to be fatally flawed, as the court did not cite any constitutional authority for the continuing detention of the refugees by the President.⁵² Henkin is particularly critical of the language of the decision claiming, for the President, the authority to "disregard international law in service of domestic needs."⁵³ In his view, "[t]here is no such principle; neither precedent nor plausible argument supports it. The President cannot disregard international law 'in the service of domestic needs' any more than he can disregard any other law."⁵⁴

B. GEOGRAPHY AND DOMESTIC CASE LAW

Even had *Garcia-Mir* conclusively established presidential authority to displace customary international law, it could not be cited as support for Barr's position. *Garcia-Mir*, as well as every case cited in his statement before Congress and all other recorded cases dealing with this issue,⁵⁵ refer to the displacement of international law

⁴⁷*Id.* at 1453.

⁴⁸*Id.* at 1455.

⁴⁹See J. Brierly, *supra* note 1, at 74-76. See generally L. Henkin, *supra* note 15.

⁵⁰L. Henkin, *supra* note 15, at 882.

⁵¹*Id.* at 884.

⁵²*Id.*

⁵³*Garcia-Mir*, 788 F.2d at 1455.

⁵⁴L. Henkin, *supra* note 15, at 885.

⁵⁵See *Dim v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *The Over the Top*, 5 F.2d 838 (D. Conn. 1925); *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959); *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

within the territory controlled by the sovereign. There exists no case law that sets forth the authority of either Congress or the President to displace international law *outside the territory of the United States.*

The only case that speaks to congressional authority to extend United States jurisdiction beyond United States territory is *Over the Top* and, even here, the extension of such authority was limited to the power to proscribe certain activities beyond the traditionally recognized three nautical mile territorial limit.⁵⁶ Thus, this case does not recognize an inherent congressional authority to displace customary international law *within the territory of another state.* Likewise, there is no case that recognizes such authority in the President.

Brown and Schooner declared that international law was part of United States domestic law and recognized the sovereign's authority to displace international law within its territory. Since that time, the cases dealing with this issue have been a confusing effort to establish the position of international law in the hierarchy of United States domestic law. The manner in which international law has been displaced by United States law is settled in some areas, such as that of congressional action in displacing treaties. However, the Executive power to displace international law is still evolving. One fact is clear, nevertheless. No case law exists to support Barr's claim that the President can displace international law extraterritorially.

It is one thing to say that a sovereign may control immigration, alcohol sales, service of process, and the seizure of enemy property during war *within its own territory*, regardless of what customary international law may require. It is quite another to say that a state can displace the customary international law of sovereignty within another state's territory. This approach goes beyond even the "extreme dualist position" of *Garcia-Mir*. It distorts dualism to the extent that it becomes a mere excuse for unilateral intervention in the affairs of sovereign states.

It is ironic that the DOJ opinion relies on dualism for the authority to violate a state's territorial integrity. It was the very concept of territorial integrity that served as the foundation for Justice Marshall's establishment of dualism in the United States judicial system.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limita-

⁵⁶*Over the Top*, 5 F.2d at 843.

tion not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such a restriction.⁵⁷

Section 115 of the *Restatement (Third) of the Foreign Relations Law of the United States* sets forth rules to deal with "Inconsistency Between International Law or Agreement and Domestic Law."⁵⁸ A reporter's note in this section states that *Garcia-Mir* suggests the President "may have the power to act in disregard of international law," assuming he is acting within his constitutional authority.⁵⁹ The section as a whole, however, focuses on acts of Congress that supercede international law or, more specifically, an international agreement.

Most interesting for the purposes of this analysis is the following quotation from the *Restatement (Third)* that deals with the displacement of international law: "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."⁶⁰ The Congress, whose authority to displace international law has been acknowledged for over 150 years, can only displace international law domestically. Even if the President possessed a similar authority, it would not be broader than that of Congress.

C. EXECUTIVE POWERS AND RECENT LEGISLATION

Barr also cites the Constitution as authority for a presidential violation of customary international law. In doing so, he focuses on the executive responsibility and authority set forth in article II, section 3: "[The President] shall take care that the laws be faithfully executed."⁶¹ Barr claims this provision alone grants the Executive the power to "authorize agents of the Executive Branch to conduct extraterritorial arrests."⁶²

⁵⁷*Schooner Exchange*, 11 U.S. (7 Cranch) at 156.

⁵⁸See *Restatement (Third) of the Foreign Relations Law of the United States* § 115 (1987) [hereinafter *Restatement (Third)*].

⁵⁹*Id.* n.3.

⁶⁰*Restatement (Third)*, *supra* note 58, § 115(1)(b).

⁶¹U.S. Const. art. II, § 3.

⁶²W. Barr, *supra* note 2, at 9.

Relying on *In re Neagle*,⁶³ an 1889 Supreme Court decision, Barr contends that the “laws” the President must faithfully execute are not limited to affirmative acts of Congress. In *Neagle* the Attorney General ordered a federal marshal to protect Justice Field, a Supreme Court Justice. While in California, the federal marshal killed a person who attacked Justice Field. The Supreme Court determined that the bodyguard was not subject to California law as a result of the supremacy of federal law. Though there had been no congressional action authorizing this protection, the Supreme Court ruled that the Attorney General had acted within the authority granted the executive branch by the “faithfully executed” clause of the Constitution.⁶⁴ Referring to this enforcement duty, the Supreme Court posed a rhetorical question.

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all protection implied by the nature of the government under the Constitution?⁶⁵

As might be expected, the Court adopted the expansive interpretation of the duty. Barr seizes on this language and combines it with the President’s extensive foreign affairs powers.⁶⁶ “Commensurate with these inherent powers, this authority carries with it the power to direct Executive Branch agents to carry out arrests that contravene customary international law and other law principles which our legislature has not acted upon to make part of our domestic law.”⁶⁷

Barr thus uses the President’s foreign affairs powers to transform a unique and obscure Supreme Court decision into one that supports Executive authority to violate international law. The dangers inherent in this quantum leap of logic are clear when the 1989 DOJ opinion is placed into historical perspective.

⁶³135 U.S. 1 (1890).

⁶⁴*Id.* at 75.

⁶⁵*Id.* at 64.

⁶⁶See *infra* text accompanying notes 136-54.

⁶⁷W. Barr, *supra* note 2, at 10.

D. EVOLUTION OF RECENT LEGISLATION

During the 1960's and 1970's, the international community confronted an epidemic of aircraft hijacking.⁶⁸ In response, the vast majority of nations agreed to a series of international conventions dealing with this issue. These agreements identified aircraft hijacking and all related acts as crimes and expanded each signatory's jurisdiction over these offenses.⁶⁹ Congress then enacted implementing legislation,⁷⁰ as the United States-applied concept of dualism requires.⁷¹

In the latter 1970's there occurred a dramatic growth in both the number and forms of international terrorism.⁷² Unlike the dilemma of aircraft hijacking, the international community could not reach a consensus on how to deal with this problem. The difficulty was as fundamental as the inability to define terrorism.⁷³ The Contra rebel, the PLO regular, the Mujaheddin soldier, and the IRA activist were freedom fighters to some, but common criminals to others.

On December 17, 1979, the U.N. General Assembly adopted the International Convention Against the %king of Hostages,⁷⁴ without vote, and opened it for signature the next day. Ten years later, only fifty-seven states had signed this convention, roughly half the number of signatories of the aircraft hijacking conventions.⁷⁵ Focus-

⁶⁸Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 Am. J. Int'l. L. 880, 884 n.24 (1989).

⁶⁹The Tokyo Convention, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 7192; The Hague Antihijacking Convention, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; The Montreal Sabotage Convention, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570. *See also* Lowenfeld, *supra* note 68, at 885.

⁷⁰The U.S. already had domestic legislation relating to aircraft piracy and related acts. The Federal Aviation Act of 1958 (49 U.S.C. § 1301 (1958)) had been amended in 1961 to include "'aircraft piracy' and associated acts and threats of violence, on board 'an aircraft in flight in air commerce.'" Lowenfeld, *supra* note 68, at 884. *See* 49 U.S.C. § 1472 (1982). Subsequent acts of Congress refined the definitions of the crimes and expanded jurisdiction in accordance with the international conventions cited *supra* at note 60. Jurisdiction based on the registry of the aircraft was created in 1969, *see* 49 U.S.C. § 1301(32) & (38) (1982). The Antihijacking Act of 1974 implemented the universality principle of the Hague Convention by claiming jurisdiction over offenses committed on aircraft that later land in the U.S. with the suspect aboard and over offenses occurring wholly outside the U.S. when the perpetrator is later discovered in the U.S. *See* Pub. L. No. 93-366, tit. I, 88 Stat. 409 (1974). *See generally* Lowenfeld, *supra* note 68, at 884-87.

⁷¹Restatement (Third), *supra* note 58, § 111(4).

⁷²J. Murphy, Punishing International Terrorists 108-22 (1985).

⁷³*Id.* at 3.

⁷⁴GA Res. 34/146 (Dec. 17, 1979), *reprinted in* 18 I.L.M. 1456.

⁷⁵As of January 1, 1990, the Hostage Convention had 57 signatories; the Tokyo Convention had 131 signatories; the Hague Convention had 139 signatories; and the Montreal Convention had 138 signatories. *See* U.S. Department of State, Treaties In Force 282-84, 376-77 (1989); and U.S. Department of State, *Current Actions*, 89 Bull. 2142-53 (1989).

ing on one particular terrorist act, the Hostage Convention represents a patchwork approach to combatting international terrorism. The Convention defines the act of hostage-taking⁷⁶ and requires that a signatory exercise *in personam* jurisdiction over the individual concerned, either by submitting the case to its "competent authorities" for prosecution or by extraditing the individual to another interested signatory.⁷⁷

Although this convention addressed a very narrow area of international terrorism, it nevertheless contained exceptions capable of consuming the rule. Article 9 contains the standard "political offenses" language that enables a signatory to ignore the convention if it concludes the act in issue was more political in nature than criminal.⁷⁸ Some authorities have deemed terrorist acts to be political in nature *per se*.⁷⁹

Article 12 also contains a significant exception. This provision states that the convention does not apply to armed conflicts, as such conflicts are defined by the 1949 Geneva Conventions and the Protocols to these Conventions.⁸⁰ The former simply refer to "international armed conflicts."⁸¹ Additional Protocol I expands this term to include armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."⁸² The United States has

⁷⁶ Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages . . . within the meaning of this Convention.

The Hostage Taking Convention, *supra* note 74, art. 1.

⁷⁷The Hostage Taking Convention, *supra* note 74, art. 8.

⁷⁸The Hostage Taking Convention, *supra* note 74, art. 9. *See also* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 Tex. Int'l L.J. 1 (1988).

⁷⁹*See generally* International Terrorism and Political Crime (M. Bassiouni ed. 1975).

⁸⁰The Hostage Taking Convention, *supra* note 74, art. 12.

⁸¹Common article 2 of the 1949 Geneva Conventions refers to armed conflicts between signatories. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365. *See* Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 Va. J. Int'l L. 693 (1986).

⁸²Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims in International Armed Conflict (Protocol I), art. 1, para. 3, U.N. Doc. A/32/144, annex I, *reprinted in* 16 I.L.M. 1391; Official Document Section, 72 Am. J. Int'l L. 457 (1978).

refused to ratify this Protocol, in great part because of this expansive definition of "international armed conflict."⁸³ In the context of the Hostage Convention, this definition serves as a significant loophole available to any signatory of the convention. Those terrorist acts deemed to be "too criminal" to qualify as "political offenses" may well be viewed as legitimate actions taken in the context of an "international armed conflict."

The jurisdictional bases set forth in the Hostage Convention include all five bases traditionally recognized under international law for the exercise of extraterritorial jurisdiction.⁸⁴ Under the Convention, a state may assert jurisdiction over the offense if: 1) the offense occurs in its territory or aboard ships or aircraft registered in that state (territorial principle); 2) the offender is a national of that state (nationality principle); 3) the offense was committed to force that state to do or refrain from doing something (protective principle); 4) the offender is later found in that state's territory (universal principle); or 5) the victim of the offense is a national of that state (passive personality principle).⁸⁵

Until confronted by international terrorism, the United States had not accepted passive personality as a basis for the exercise of extraterritorial jurisdiction.⁸⁶ The United States position on this issue was modified with the passage of the Comprehensive Crime Control Act of 1984,⁸⁷ an implementation of the Hostage Taking Convention. This statute adopted the convention's definition of hostage-taking and all of its extraterritorial jurisdictional bases, to include passive personality.⁸⁸

E. FBI INVOLVEMENT

While these developments were taking place, the FBI became more involved in the investigation and prevention of international terrorism. In 1982 it was designated the lead agency for investigating

⁸³See generally Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol Z*, 26 Va. J. Int'l L. 109 (1985). See also Aldrich, *supra* note 81.

⁸⁴See *Harvard Research in International Law, Jurisdiction With Respect to Crime*, 29 Am. J. Int'l L. Supp 435 (1935). See also Recent Development, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?*, 18 Vand. J. Int'l L. 915 (1985).

⁸⁵The Hostage Taking Convention, *supra* note 74, art. 5.

⁸⁶Lowenfeld, *supra* note 68, at 887.

⁸⁷18 U.S.C. § 1203 (1988).

⁸⁸*Id.* § 1203(b).

acts of terrorism committed in the United States⁸⁹ and the responsible agency for investigations abroad when authorized by the State Department.⁹⁰ As the FBI assumed these functions, Congress dramatically expanded the extraterritorial reach of domestic statutes the FBI was to enforce.

In September 1987, while still operating under the constraints of the 1980 DOJ opinion that barred its agents from violating the territorial integrity of a state, the FBI lured Fawaz Yunis from Beirut into international waters and arrested him. The warrant was based on violations of the Hostage Taking Act.⁹¹

In 1985 Yunis and several other individuals had hijacked a Jordanian airliner at Beirut International Airport with approximately fifty passengers aboard. The hijackers diverted the plane to Tunis, Cyprus, Sicily, and then back to Beirut, where they destroyed it with a bomb. The only nexus between the United States and the crime was the fact that three of the aircraft passengers were United States citizens.⁹²

In one of several *Yunis*⁹³ decisions, Judge Parker ruled that the Hostage Taking Act was a valid exercise of Congress's extraterritorial legislative authority.⁹⁴ He cited the Hostage Taking Convention and several international aircraft hijacking agreements as proof of the universal condemnation of these offenses and the international community's acceptance of the passive personality principle as a basis for jurisdiction.⁹⁵

After Yunis reached United States territory, he was also charged with a violation of the Aircraft Sabotage Act.⁹⁶ The particular provision charged required that the accused be physically present in the United States in order for a court to assert jurisdiction.⁹⁷ The court ruled that the initial extraterritorial seizure for a violation of the

⁸⁹See the unpublished statement of Oliver Revell (Associate Deputy Director-Investigations, Federal Bureau of Investigations), *Opening Statement Before An Open Session of the Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary*, 101st Cong., 1st Sess. (Nov. 8, 1989).

⁹⁰*Id.* at 1.

⁹¹United States v. Yunis, 681 F. Supp. 896, 899 (D.D.C. 1988).

⁹²Lowenfeld, *supra* note 68, at 880-81.

⁹³United States v. Yunis, 681 F. Supp. 891, 896, 909 (D.D.C. 1988).

⁹⁴*Yunis*, 681 F. Supp. at 896, 905.

⁹⁵*Id.* at 900-02.

⁹⁶*Id.* at 906.

⁹⁷18 U.S.C. § 32(b) (1988).

Hostage Taking Act, which has no “physical presence” requirement, was lawful.⁹⁸ The court then found that the subsequent filing of additional charges, after Yunis had been forcibly brought to the United States, was also valid.⁹⁹ Judge Parker added a note of caution, however:

[T]he decision to permit the government to bring charges against the defendant under this statute [Aircraft Sabotage Act] should not be regarded as giving the government carte blanche to act as a global police force seizing and abducting terrorists anywhere in the world. The government cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute.¹⁰⁰

It is not clear whether these comments were limited to those instances in which law enforcement agents might attempt to establish jurisdiction over a person by forcibly returning this individual to the United States or whether the judge intended that cautionary statement be given a much broader application. Arguably, these words serve to advise government officials that they must respect the “principles of international law” in all of their extraterritorial law enforcement efforts.

F. THE ANTITERRORISM ACT

In October 1985 four Palestinian terrorists hijacked the *Achille Lauro*, an Italian cruise ship, in the Mediterranean Sea. Approximately 400 passengers were aboard, to include twelve United States citizens. During the hijacking, the terrorists murdered a United States national, Leon Klinghoffer. At the time, this act “was not a crime under United States law.”¹⁰¹

⁹⁸ *Yunis*, 681 F. Supp. at 896, 906.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Findlay, *supra* note 78, at 44. Shortly after the *Achille Lauro* affair Judge Sofaer wrote:

Important gaps do exist in the legal structure that governs terrorist acts, and the Reagan Administration is working with Congress and with other nations to close them. For example, the U.S. government lacks a domestic legal basis to prosecute the terrorists who killed an American citizen, Leon Klinghoffer, during the October 1985 *Achille Lauro* cruise ship hijacking, or the terrorists who killed four American civilians on a hijacked Trans-World Airlines flight earlier that year.

Sofaer, *Terrorism and the Law*, 64 Foreign Aff. 901, 902 (1986). See also Recent Development, *supra* note 84.

In response, Congress passed the "Omnibus Diplomatic Security and Antiterrorism Act of 1986,"¹⁰² commonly referred to as the Antiterrorism Act. Under the provisions of this statute, it is now a violation of domestic United States law to kill or to cause serious bodily harm to an American national, or to attempt or conspire to do the same, anywhere in the world.¹⁰³ The statute requires that the Attorney General or a high ranking subordinate certify that the offense in question "was intended to coerce, intimidate, or retaliate against a government or a civilian population."¹⁰⁴

It is noted that any government or civilian population may be the victim of such coercion, intimidation, or retaliation. The statute is not limited to acts affecting only the United States. That is, its jurisdictional basis is not that of the protective principle. Moreover, in this instance, Congress was not implementing, by statute, an already ratified international agreement. Thus, this act constituted the first unilateral use by the United States of the passive personality principle for establishment of extraterritorial jurisdiction.

When Congress passed this statute, it specifically considered and rejected a "self-help" provision. Senator Specter offered a bill on July 8, 1985, titled the "Terrorist Prosecution Act." According to this proposed statute, when the Attorney General enforced laws prohibiting terrorist attacks on United States citizens, he would be authorized to "request and . . . receive assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, and the Federal Bureau of Investigation, any statute, rule, or regulation to the contrary notwithstanding." This law was never enacted. The Congress refused to authorize seizures by United States agents abroad, absent the host country's consent.¹⁰⁵

When confronted with this legislative history, Barr maintained that it was irrelevant, as he was not relying on this statute to establish the President's authority to act abroad.¹⁰⁶ Though he did not explain

¹⁰²18 U.S.C. § 2331 (Supp. V 1987)

¹⁰³*Id.*

¹⁰⁴*Id.* § 2331(e).

¹⁰⁵*Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Governmental Employees and Citizens Abroad: Hearing on S. 1337, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 7 (1985).*

¹⁰⁶James Dempsey, assistant counsel to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, questioned Barr during his appearance before the subcommittee on November 8, 1989, *See* the unpublished record of testimony, *supra* note 12, at 55.

this apparent contradiction, it appears that he was alluding to the previously discussed alleged constitutional and case law authority of the President to displace international law.

To date, the Antiterrorism Act has not served as the basis for a federal prosecution; thus, the constitutionality of this legislation has not been tested.¹⁰⁷ Moreover, it has not been relied upon to justify the violation of a state's territorial integrity by the United States.¹⁰⁸

The passage of this legislation led the FBI to ask that DOJ reconsider its earlier opinion that noted a lack of any legal basis for a violation of the territorial integrity of another state for the purpose of abducting and arresting a fugitive from United States justice.¹⁰⁹ The FBI sought this DOJ action on the assumption that, given the newly enacted legislation providing United States extraterritorial jurisdiction, there would be many more "fugitives" to pursue and that not all of these individuals would conveniently venture into international waters.

As noted above, Barr's resulting opinion relies on the Executive's constitutional responsibility to see that "the laws are faithfully executed." Given the United States acceptance of the "passive personality" concept as a basis for the exercise of extraterritorial jurisdiction, the laws that the President must now enforce include two statutes with almost limitless geographic applicability. Barr has taken the position that the President's authority to enforce United States law must be co-extensive with the extraterritorial reach of United States domestic statutes.¹¹⁰ In doing so, he confuses the authority to proscribe with the authority to enforce.

The acceptance by members of the international community of "passive personality" as a basis for the exercise of jurisdiction in the form of the Hostage Taking Convention¹¹¹ did not constitute a waiver of their sovereignty. As pointed out earlier, the "political offense" language of article 9 and the expansive definition of "armed conflict" in article 12 clearly indicate that the signatories intended to guard their territorial independence jealously.

¹⁰⁷Lowenfeld, *supra* note 68, at 891-92.

¹⁰⁸This assumes that the President did not rely on this statute or the 1989 DOJ opinion to authorize the seizure of Alvarez Machain on April 3, 1990, by "bounty hunters" in the employ of the Drug Enforcement Agency. See *infra* text accompanying notes 112-16.

¹⁰⁹W. Barr, *supra* note 2, at 1-2.

¹¹⁰*Id.* at 8.

¹¹¹The Hostage Taking Convention, *supra* note 74.

G. THE DAMAGE DONE AND DANGERS AHEAD

The effect of the DOJ opinion is yet to be determined. During the testimony before the subcommittee, both the State Department and the FBI admitted that they had to reassure many foreign governments that the United States was not planning to engage in extraterritorial arrests, absent a host nation's consent.¹¹² This is the Bush Administration's stated policy. It may not be the Administration's actual policy.

On April 3, 1990, Humberto Alvarez Machain, a Mexican physician, was apparently abducted by four Mexican policemen from his home in Guadalajara. He was forced onto a private plane and flown to El Paso, Texas, where he was arrested by Drug Enforcement Agency (DEA) agents. Machain was then flown to Los Angeles, California, where he was arraigned on April 10, 1990. Machain had been indicted by a United States Federal District Court on January 31, 1990, for his alleged involvement in the 1985 torture and murder of DEA agent Enrique Camarena in Mexico. The Mexican Government claimed that the abductors were "bounty hunters" working for the DEA.¹¹³

The Mexican government responded by arresting six Mexican citizens implicated in the abduction and requested the return of Machain to Mexican custody. Some Mexican officials have threatened to suspend drug enforcement cooperation with the United States until the matter is resolved. Vice President Quayle met with Mexican President Carlos Salinas de Gortari on April 26, 1990. The Vice President reassured President Salinas that the Bush Administration respects Mexican sovereignty. He also pointed out that "[t]here were no DEA agents in Mexico who were involved in this particular situation."¹¹⁴ On May 25, 1990, Hector Berrellez testified in Los Angeles Federal District Court during a preliminary hearing in Machain's trial. Berrellez heads a DEA unit that has been investigating the Camarena murder for five years. He testified that, with the concurrence of "senior DEA officials," he had authorized Antonio Garate Bustamonte, a former Mexican police officer, to abduct Machain and pay \$50,000 and expenses to the kidnappers.¹¹⁵

To date, the political furor has not abated. Machain has not been turned over to Mexican authorities. His trial in U.S. Federal District

¹¹²See the unpublished record of testimony, *supra* note 12, at 56.

¹¹³Washington Post, Apr. 29, 1990, at A-21, col. 4.

¹¹⁴N.Y. Times, Apr. 27, 1990, at A-8, col. 1; Washington Post, *supra* note 113

¹¹⁵Washington Post, Jul. 21, 1990, at A-4, col. 2.

Court has been delayed until the trial judge rules on the legality of his arrest. The Mexican government filed kidnapping charges against Berrellez and Garate in Mexico. On July 20, 1990, the Mexican government officially requested that the United States extradite Berrellez and Garate to Mexico for trial.¹¹⁶

It is evident that the international community does not agree with the concept that the United States has the authority to violate the territorial integrity of other states in order to enforce United States law. As a result of the opinion, the international cooperation vital to combatting terrorism and drug trafficking may wane. Moreover, states may hesitate to adopt the Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances,” fearing that the United States will view their acceptance of the “passive personality” concept as an implicit waiver of sovereignty.

Another troubling aspect of the DOJ opinion is the potential breadth of its applicability. Though the opinion focuses on the President’s use of the FBI for law enforcement overseas, the logic and conclusions put forward could well be applied to the President’s use of other United States agencies or departments for overseas law enforcement.

During the 18th and 19th centuries, law enforcement and national defense interrelated to some extent, but, by and large, these functions were separate and distinct. Typically, law enforcement was a domestic concern, the maintenance of order within the United States. The manner in which domestic law applied extraterritorially was not of particular significance. United States national defense focused on the protection of United States territory and national interests from external threats. The important issues, then, were who would conduct United States foreign policy and control its armed forces.

With the development of international commerce, travel, and communication, traditional geographic boundaries have begun to disappear. The threats to United States national interests are no longer posed exclusively by the military forces of its enemies. These threats now include isolated terrorist cells attacking innocent United States citizens overseas simply because of their nationality. Frequently, these terrorists are based in the territory of nations unfriendly to the United States.¹¹⁸ Internal social order is now endangered by drug

¹¹⁶*Id.*

¹¹⁷28 I.L.M. 493 (1989).

¹¹⁸Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: W-
rorism, the Law, and the National Defense*, 126 Mil. L. Rev. 89, 92 (1989).

production and distribution occurring far beyond United States shores. Law enforcement within the United States, in some ways, depends upon effective law enforcement outside the United States. The distinction between national defense and law enforcement has become blurred. This creates a danger that the Executive powers to "faithfully execute" the laws and to serve as Commander-in-Chief may also be blurred.¹¹⁹

On November 3, 1989, Barr authored another DOJ opinion. This opinion concluded that the Posse Comitatus Act¹²⁰ did not apply outside the territory of the United States.¹²¹ This act bars the use of the Army or Air Force for domestic law enforcement purposes.¹²² Though a discussion of the Posse Comitatus Act is beyond the scope of this study, Barr's opinion dealing with this Act must be read in conjunction with the conclusions he reached in his June 1989 opinion. Thus, if the President can use the FBI to "displace" customary international law, he seemingly may now use the 82d Airborne Division for this same purpose. In brief, any presidential reliance on the June 1989 DOJ opinion to justify a unilateral United States law enforcement action overseas using either law enforcement agents or military forces would be ill-advised.

III. AN ALTERNATIVE APPROACH

A. EXTRADITION

Every sovereign state has domestic laws it wishes to enforce beyond its borders. The United States is no exception. The problem arises when one state attempts to exercise its authority over individuals located within the territory of another sovereign state. The concept of extradition is designed to strike a balance between the sanctity of one state's territorial integrity and the law enforcement interests of another.¹²³ The United States is a signatory to more than 100

¹¹⁹See *infra* text accompanying notes 136-54.

¹²⁰18 U.S.C. § 1385 (1988).

¹²¹Unpublished DOJ opinion entitled *Memorandum for General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Council, Re: Extraterritorial effect of the Posse Comitatus Act*, November 3, 1989.

¹²²Whoever, except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1988).

¹²³See generally M. Bassiouni, *International Extradition and World Public Order* (1974).

bilateral extradition treaties, as well as many multilateral treaties that include an obligation to "prosecute or extradite."¹²⁴ Although the extradition process is often cumbersome and slow¹²⁵ it has nevertheless proven to be effective in the recent campaign against Colombian drug lords. In less than a year, the Colombian Government has extradited more than a dozen individuals under indictment in the United States for drug-related offenses.¹²⁶

There are also "informal" methods of extradition, such as exclusion and deportation.¹²⁷ These have been criticized by some publicists; however, they have been used effectively by states to shorten the traditional extradition process.¹²⁸

In contrast, abduction has never been accepted by the international community as a valid method of law enforcement. Notwithstanding this fact, many states have kidnapped fugitives in the territory of another state without that state's consent.¹²⁹ The end results of these actions have ranged from the prosecution and execution of the fugitive by the abducting state,¹³⁰ to the prosecution of the fugitive and extradition of the kidnappers to the state whose territorial integrity had been violated.¹³¹

Judge Abraham Sofaer, former Legal Advisor to the Department of State, has noted that "we are aware of no State that treats an abduction as an illegal arrest for purposes of its own law when the abducted individuals are being prosecuted."¹³² Moreover, the United States does subscribe to the principle of *male capere bene detentio*.¹³³ This, however, begs the question of the abduction's legality under international law.

Judge Sofaer also appeared before Congress when the Antiterrorism Act was being considered. He testified, in part, as follows:

¹²⁴Findlay, *supra* note 78, at 9.

¹²⁵*Id.* at 6-16.

¹²⁶Washington Post, Jan. 19, 1990, at 17, col. 5.

¹²⁷J. Murphy, *supra* note 72, at 81-93.

¹²⁸See M. Bassiouni, *supra* note 79, at 343. See also Findlay, *supra* note 78, at 7.

¹²⁹M. Bassiouni, *supra* note 79, at 346-52.

¹³⁰See Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 5 (D. Ct. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Supreme Court, Israel 1962).

¹³¹See Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987). See also *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

¹³²Sofaer, *supra* note 118, at 111.

¹³³See *Ker v. Illinois*, 119 U.S. 436 (1888); *Frisbie v. Collins*, 342 U.S. 519 (1952). See also Findlay, *supra* note 78, at 17.

I was glad to see that the bill does not provide for any "self-help" measures. The Due Process clause of the Constitution does not automatically preclude U.S. courts from trying persons forcibly seized abroad by U.S. authorities. It would be wrong, however, to extrapolate from this the conclusion that such seizures themselves are perfectly lawful In general, seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of the foreign State, could violate local kidnapping laws, and might be viewed by the foreign State as a violation of international law and as incompatible with any bilateral extradition treaty in force.¹³⁴

United States law dictates that extradition requests be considered only in accordance with a treaty.¹³⁵ Securing jurisdiction by means of an illegal abduction obviously results in the complete vitiation of the extradition concept.

B. ADDITIONAL PRESIDENTIAL POWERS

Referring to the threat posed by international terrorist groups to United States national security interests, Barr wrote: "The extraterritorial enforcement of United States laws is of growing importance to our ability to protect vital national interests."¹³⁶ This statement is important in two ways. First, it points the way to additional domestic sources of authority that, when combined with the President's responsibility to "faithfully execute" the laws, authorizes extraterritorial presidential action. Secondly, it reveals a very egocentric, American viewpoint that obscures principles of international law that also may be cited as support for unilateral United States actions.

By definition, extraterritorial law enforcement involves the foreign affairs powers of the President. These are both ill-defined and exceptionally broad. In *United States v. Curtiss-Wright Corporation*¹³⁷ Justice Sutherland, writing for the Supreme Court, noted:

¹³⁴*Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Governmental Employees and Citizens Abroad: Hearing on S. 1337, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1985).

¹³⁵18 U.S.C. § 3181, 3184 (1988). See also Restatement (Third), *supra* note 58, § 475.

¹³⁶W. Barr, *supra* note 2, at 1.

¹³⁷299 U.S. 304 (1936).

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of **nationality**.¹³⁸

Foreign affairs authority is also vested solely in the President. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹³⁹

It is interesting to consider the logical implications of Justice Sutherland's opinion. The President's foreign affairs powers are rooted in the sovereignty of the nation, and the sovereignty of the nation is defined by general principles of international law. Thus, arguably, the President's foreign affairs powers must be limited by these same general principles of international law.

When United States national security is threatened, the President's authority as **Commander-in-Chief**¹⁴⁰ must also be added to the equation. Efforts by Congress to limit the presidential powers as Commander-in-Chief have met with mixed results.¹⁴¹ The constitutional limitations on presidential authority to use the armed forces are beyond the focus of this discussion. Suffice it to say, however, that this power is also broad, ill-defined, and the source of controversy.¹⁴² For the purposes of this study, it is enough to recognize that the President may use the armed forces beyond the borders of the United States to protect the "vital national interests" of the nation.¹⁴³

The courts have traditionally avoided defining the parameters of the President's powers as Commander-in-Chief, labeling issues relating to these powers as political and nonjusticiable.¹⁴⁴ Barr would have us believe that *Youngstown Sheet & Tube Co. v. Sawyer*¹⁴⁵ was

¹³⁸*Id.* at 318.

¹³⁹*Id.* at 319.

¹⁴⁰U.S. Const. art. II, § 2.

¹⁴¹The War Powers Resolution, 50 U.S.C. § 1541-1548 (1982).

¹⁴²L. Henkin, *Foreign Affairs and the Constitution* 50-54 (1972). See also Sofaer, *supra* note 118, at 113.

¹⁴³L. Henkin, *supra* note 142, at 53.

¹⁴⁴*Soltzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *Rappenecker v. United States* 509 F. Supp. 1024 (N.D. Cal. 1980).

¹⁴⁵343 U.S. 579 (1952).

an exception to this rule when he quotes from Justice Jackson's concurring opinion. "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."¹⁴⁶

Actually, this language is dicta. *Youngstown* involved President Truman's seizure of coal mines in April 1952. The Supreme Court determined that this action violated the Constitution. Justice Black wrote the opinion of the court, and five Justices wrote separate concurring opinions. In his opinion, shortly following the above language quoted by Barr, Justice Jackson went on to write that the President's authority as Commander-in-Chief did not constitute a valid basis for his actions.¹⁴⁷ Thus, Barr has attempted to capitalize on gratuitous language in a concurring opinion in order to support his expansive position concerning presidential authority as the Commander-in-Chief.

A recent effort by the Supreme Court to further define presidential authority was *Dames & Moore v. Reagan*.¹⁴⁸ This case dealt with the President's authority, under the International Emergency Economic Powers Act,¹⁴⁹ to freeze and release the property of a foreign government during a declared national emergency, the Iran-hostage crisis. Justice Rehnquist delivered the opinion of the Court and refined *Youngstown*.

In *Youngstown* Justice Jackson devised three categories of presidential action and ascribed to each varying degrees of judicial deference.¹⁵⁰ Justice Rehnquist wrote that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."¹⁵¹ Presidential actions that have the "explicit congressional authorization" are entitled to the "strongest of presumptions."¹⁵² But when the President acts against an "explicit congressional prohibition . . . his power is at its lowest ebb."¹⁵³

¹⁴⁶*Id.* at 645.

¹⁴⁷*Id.*

¹⁴⁸453 U.S. 654 (1981).

¹⁴⁹50 U.S.C. §§ 1701-1706 (1982).

¹⁵⁰*Youngstown*, 343 U.S. at 637.

¹⁵¹*Dames & Moore*, 463 U.S. at 669.

¹⁵²*Youngstown*, 343 U.S. at 637. *cited with approval in Dames & Moore*, 463 U.S. at 668.

¹⁵³*Id.* at 637-38, *cited with approval in Dames & Moore*, 463 U.S. at 669.

This language is particularly significant in relation to the Antiterrorist Act. As earlier noted, when Congress passed this statute it considered and rejected a “self-help” provision.¹⁵⁴ Congress thus intentionally did not include the authority to seize fugitives extraterritorially without the consent of the country in which they were found. Though Congress did not explicitly prohibit such action, the legislative intent is clear. Accordingly, if the President’s actions are based solely on this statute, his power will be approaching its “lowest ebb” on Justice Rehnquist’s spectrum.

C. THE FBI ENABLING STATUTES

The specific statutes upon which both DOJ opinions focus authorize the FBI to investigate and to arrest.¹⁵⁵ Barr points out that this authority is granted “without any express geographic limitation.”¹⁵⁶ He reasons that, “because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general enabling statutes in a manner that precludes the exercise of this authority.”¹⁵⁷ As noted, the existence of this presidential authority remains to be proven.

Barr also claims that these statutes “confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI’s conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to do so.”¹⁵⁸ Here, Barr is correct.

“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”¹⁵⁹ It is possible to interpret the statutes in issue in a manner consistent with principles of international law. The 1980 DOJ opinion did this when it concluded that the statutes authorize the FBI to arrest a fugitive in the territory of another state with that state’s consent. This respect for the sovereignty of another state is perfectly consistent with customary international law.

¹⁵⁴See *supra* text accompanying note 105.

¹⁵⁵28 U.S.C. § 533(1) (1982); 18 U.S.C. § 3052 (1988).

¹⁵⁶W. Barr, *supra* note 2, at 7.

¹⁵⁷*Id.* at 8.

¹⁵⁸*Id.* at 7.

¹⁵⁹See Restatement (Third), *supra* note 58, § 114.

Both enabling statutes predate the acceptance of the "passive personality" jurisdictional concept by the United States.¹⁶⁰ Thus, when Congress enacted the enabling statutes, it could not have considered the possibility that some day the United States would have such broad extraterritorial jurisdiction. Also, as noted earlier, when the Congress did finally accept "passive personality" as an extraterritorial jurisdictional basis, it specifically rejected a proposed "self-help" law enforcement provision.¹⁶¹

The domestic authority of the President to order the arrest of fugitives extraterritorially is based upon all three of the constitutional powers discussed in this article: to see that United States laws are faithfully executed; to conduct United States foreign policy; and to protect the national security. The enabling statutes are domestic laws that authorize the FBI to investigate and to arrest. The President may use the FBI in a way that is inconsistent with all of the powers he has been granted under the Constitution. This provides the President with the power to act, but it is only part of the answer.

D. DOJ v. THE STATE DEPARTMENT

Barr's contention that the extraterritorial enforcement of United States law is of growing importance to United States "vital national interests" reveals the fundamental problem associated with the 1989 DOJ opinion. Its perspective is skewed. The opinion interprets domestic case law and statutes from an egocentric, American point of view. Barr resembles the biased scientist who arrives at his conclusions and then conducts experiments in order to support them. This lack of objectivity obscures a principle source of authority for extraterritorial, unilateral action by the President: international law.

Were a state faced with a choice between the protection of the "vital national interests" to which Barr makes reference or compliance with international law, compliance would be the exception rather than the rule. Such is not the case, however, for international law also provides the authority for United States protection of its vital national interests. Strangely enough, the very system of laws Barr claims the President may violate provides the President with the authority to accomplish his goals.

¹⁶⁰The authority to investigate, 28 U.S.C. § 533(1) (1982), was first enacted in 1926, and the authority to arrest, 18 U.S.C. § 3052 (1982), dates back to 1948. The first acceptance of the passive personality principle as a jurisdictional basis in the U.S. occurred in 1984 with the enactment of the Comprehensive Crime Control Act, 18 U.S.C. § 1203 (Supp. V 1987).

¹⁶¹See *supra* text accompanying note 105.

Judge Sofaer testified before the same subcommittee that heard the testimony of Mr. Barr. Sofaer's statement before that subcommittee and a recent article he authored¹⁶² set forth the current State Department position regarding use of force to combat terrorism. Sofaer suggests that the issue must be addressed as one of national defense, not law enforcement. "To deal effectively with state-sponsored terrorism requires treating its proponents not merely as criminals, but as a threat to our national security."¹⁶³ As might be expected, this is consistent with National Security Defense Decision (NSDD) 138, issued by President Reagan in April 1984.¹⁶⁴ That still-classified document describes terrorism as a threat to United States national security and claims the right of self-defense in combatting it.¹⁶⁵

During the hearing before the subcommittee, it appeared that Barr and Sofaer had very different opinions about the President's authority to order the seizure of individuals suspected of violating United States laws in a foreign country without that state's consent. The chairman, Mr. Edwards, commented, "I'm curious as to why we have two departments obviously at odds."¹⁶⁶ Barr responded that DOJ and the State Department were not in disagreement. They did disagree, however, in a most fundamental way. Barr said that

after the President determines that it's in the national interest to pursue a particular law enforcement operation overseas, that judgement, as a matter of domestic law, overrides customary international law, and that is an authorized, legal, constitutional action for American agents to engage in. At the same time, it is a violation, or under many circumstances it could be a violation of international law and we would have to be prepared to take the consequences of that violation.¹⁶⁷

The Chairman then had this exchange with Judge Sofaer:

Mr. Edwards: Is it your testimony that if the President decides that there is some drug guy in Colombia, for example, that is so menacing to the United States that that alone would be of sufficient danger to the United States so that Mr. Revell

¹⁶²Sofaer, *supra* note 118.

¹⁶³*Id.* at 90.

¹⁶⁴Terry, *Countering State-Sponsored Terrorism*, 36 Naval L. Rev. 159, 166 (1986).

¹⁶⁵*Id.*

¹⁶⁶See the unpublished record of testimony, *supra* note 12, at 42.

¹⁶⁷*Id.* at 45.

[Associate Deputy Director of the FBI] could send in some FBI agents?

Judge Sofaer: No, Mr. Chairman. My testimony would be that there would have to be specific acts or dangers that amounted to an attack on the United States under the U.N. Charter, and that the President would then have to be able to act in self-defense, which requires action that does not go beyond what is necessary and proportional.¹⁶⁸

According to Barr, if the President determines it is "in the national interest," the **FBI** may violate the territorial integrity of another state and seize an individual suspected of violating United States laws. This subjective standard is far from Sofaer's position, which acknowledges that the President does not have the authority to order the violation of a state's territorial integrity unless criteria established in customary international law have been met.

E. STATE-SPONSORED TERRORISM

Sofaer concedes that territorial integrity is a "fundamental attribute of sovereignty,"¹⁶⁹ but points out that it is not entitled to "absolute deference in international law."¹⁷⁰ "[O]ur national defense requires that we claim the right to act within the territory of other States in appropriate circumstances."¹⁷¹ This right, however, is limited. "The violation of a State's territorial integrity must be based on self-defense."¹⁷²

Article 51 of the United Nations Charter reserves the "inherent right of individual or collective self-defense if an armed attack occurs."¹⁷³ The United States has consistently interpreted "inherent" and "armed attack" expansively. "The United States has long assumed that the inherent right of self-defense potentially applies

¹⁶⁸*Id.* at 61.

¹⁶⁹Sofaer, *supra* note 118, at 106.

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Id.* at 109.

¹⁷³ Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter, art. 51.

against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.”¹⁷⁴ The definition of armed attack must allow a state to “effectively . . . protect itself and its citizens from every illegal use of force aimed at the State.”¹⁷⁵ Sofaer believes this broad interpretation of the Charter is essential for any state combatting terrorism.

A good illustration of United States policy is the Libyan air strike of 1986. Based on persuasive intelligence reports,¹⁷⁶ the United States established that the Libyan Government had directed a terrorist bombing of a discotheque, killing two and wounding another seventy-eight United States citizens in West Berlin on April 5, 1986. There were also continuing reports that Libya was planning additional attacks against United States nationals.¹⁷⁷ In an act of anticipatory self-defense, the United States bombed five Libyan bases that had been linked to the training of international terrorists.

The discotheque bombing established the imminence of the terrorist threat created by Libya. Terrorists trained and directed by the Libyan Government had now demonstrated their ability to strike. The United States response was a measured one, using only the force necessary to deal with the threat.¹⁷⁸ The United States argued that this was a valid act of self-defense under the principles of customary international law.¹⁷⁹ “The ultimate remedy for a State’s knowingly harboring or assisting terrorists who attack another State or its citizens is self-defense.”¹⁸⁰

The terrorism sponsored by Libya, however, is qualitatively different from acts of terrorism that are not sponsored by a state. The United States could reasonably argue that Libya’s actions constituted an “armed attack” and then invoke the right of self-defense. Moreover, the state whose territorial integrity was violated was the state responsible for the terrorism. Barr does not condition the President’s authority to violate a state’s territorial integrity on that state’s responsibility for the act of terrorism. Barr does not condition that authority at all.

¹⁷⁴Sofaer, *supra* note 118, at 93.

¹⁷⁵*Id.* at 92.

¹⁷⁶Terry, *supra* note 164, at 181-84.

¹⁷⁷*Id.*

¹⁷⁸*Id.* at 83.

¹⁷⁹N.Y. Times, Apr. 15, 1986, at A-10, col. 1; and A-11, col. 4.

¹⁸⁰Sofaer, *supra* note 118, at 103.

Barr ignores some very basic facts. Not every act of terrorism against United States interests is state-sponsored or constitutes an "armed attack." Not every state-sponsored terrorist finally located is in the state that sponsored the attack. Those terrorist acts that have no state-sponsorship are criminal acts and require international cooperation in the law enforcement arena. They do not authorize, under domestic or international law, the President to violate the territorial integrity of any state.

IV. CONCLUSION

Barr contends that the President has the authority to "displace" customary international law when he, in his sole discretion, determines violating another state's territorial integrity is "in the national interest." Barr manipulates dualism, case law, statutes, and the Constitution to create this Presidential authority.

Contrary to Barr's position, the President is bound by international law. There is no constitutional provision, no statute, and no case that authorizes the President to displace customary international law beyond the territorial borders of the United States. The President does not have the authority under either domestic or customary international law to violate the territorial integrity of any state for the purposes of enforcing the laws of the United States. The Constitution and enabling statutes give him the power to use the FBI extraterritorially. That use, however, must be in conformance with general principles of customary international law. The President must obey international law rather than "displace" it.

EDITOR'S NOTE: On August 10, 1990, Federal District Court Judge Edward Rafeedie ruled that Machain was illegally kidnapped from Mexico and must be returned. The trial judge found that the court lacked jurisdiction because the United States had violated its extradition treaty with Mexico. The Department of Justice is appealing the decision.

THE INTERNATIONAL EXPORT OF HAZARDOUS WASTE: EUROPEAN ECONOMIC COMMUNITY, UNITED STATES, AND INTERNATIONAL LAW

by Captain Peter D.P. Vint*

I. INTRODUCTION

The export of hazardous waste across national borders has become an international problem! In the United States and other countries, there is a scarcity of hazardous waste treatment facilities, and few countries want new facilities. Meanwhile, facilities that do exist for treating and disposing of hazardous waste are reaching capacity, and few new facilities are being built.²

This article reviews the international law and the U.S. domestic law that governs the exporting of hazardous waste. The United States and other countries are beginning to control this problem, and have adopted several laws and treaties in an attempt to protect the world's environment.

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¹Kelly, *International Regulation of Transfrontier Hazardous Shipments: A New EEC Environmental Directive*, 21 Texas Int'l L.J. 86 (1985). The problem of shipment of hazardous waste within a country is outside the scope of this article.

²Helfenstein, *U.S. Controls on International Disposal of Hazardous Wastes*, 22 Int'l Law. 775 (1988).

II. EXPORTING HAZARDOUS WASTE: A DANGEROUS PRACTICE

A. THE PROBLEM

Unfortunately, market incentives encourage business to dispose of hazardous waste unsafely through "midnight dumping."³ Generators of hazardous waste can escape regulatory and physical constraints by shipping the waste to other countries.⁴ In particular, generators of hazardous waste can avoid stringent environmental regulations in their home countries and save money by shipping it to other countries.⁵

Although some export of hazardous waste may be necessary for various reasons, it poses a significant threat to human health and the environment. First, there is a potential for spills or accidents during transit, which would release hazardous waste directly into the environment. Second, the waste may not be taken to an approved disposal facility upon leaving the generator country, thus creating an environmental hazard.⁶ Hazardous wastes that are incompletely or improperly discarded may contaminate not only the disposal site, but also may contaminate adjacent countries. Furthermore, the damage may not become apparent until much later, making cleanup more difficult.⁷

The quantities of hazardous waste produced are enormous. The United States Environmental Protection Agency (EPA) estimates that each year fifty to sixty million metric tons of hazardous waste are produced, and most of it is disposed of in ways that cause significant environmental damage. EPA also estimates that millions of tons of hazardous waste are disposed of illegally every year, including exports across national boundaries.⁸ This includes hundreds of tons of hazardous waste smuggled annually out of the United States alone.⁹

Greenpeace, an environmentally-concerned organization, claims to know of plans by American parties, with or without authoriza-

³Maes, *Transboundary Waste Dumping: The United States and Mexico Take a Stand*, 27 Nat. Resources J. 941 (1987).

⁴Helfenstein, *supra* note 2, at 776.

⁵Kelly, *supra* note 1, at 86; Aeppel, *Curbing Abuses in Export of Waste*, Christian Science Monitor, Mar. 24, 1989, at 4, col. 3.

⁶Kelly, *supra* note 1, at 87.

⁷Helfenstein, *supra* note 2, at 788.

⁸Maes, *supra* note 3, at 941-42.

⁹*Waste-Watching*, The Economist, Feb. 18, 1989, at 44, col. 1.

tion, to export hazardous waste to forty-four countries.¹⁰ Greenpeace has also verified over 150 actual and proposed attempts to dispose of hazardous waste over a three-year period in eighty-six countries!" It estimates that over three million tons of waste move around the world each year.¹²

Officially, more than 600,000 tons of hazardous waste are exported annually from Organization for Economic Cooperation and Development (OECD) countries. However, the actual quantity is estimated to be twice this amount.¹³ According to OECD, each year Western Europe has approximately 100,000-120,000 international shipments of hazardous waste, equalling about 250,000 tons. Of this, 80% goes to other Western European countries, 15% to Eastern Europe, and 5% to developing countries.¹⁴ These shipments are increasing as a result of a lack of disposal capacity in generator states and lower disposal costs in other countries, often due to less stringent environmental protection regulations.¹⁵

Not more than 20% of exported hazardous waste moves from developed countries to developing countries, while the rest moves between developed countries.¹⁶ For example, the largest amount of hazardous waste exported from the United States goes to Canada.¹⁷ Australia and New Zealand ship hazardous waste to Great Britain, and Belgium has become a specialist in recycling hazardous waste, including toxic chemicals.¹⁸ Some developing countries also export hazardous waste; for example, Bahrain exports to Great Britain, and Singapore exports to Thailand.¹⁹

The United Nations Environment Program (UNEP) estimates that inter-European transfers of all waste, including hazardous waste, constitute about 800,000 tons of waste annually, of which West Germany

¹⁰*Id.*

¹¹*Greenpeace Seeks International Ban on Traffic in Toxic, Hazardous Waste*, Env't Rep., Aug. 5, 1988, at 472 [hereinafter *Greenpeace*].

¹²*Western, African Nations Fail to Agree on Transboundary Movement of Toxic Wastes*, Int'l Env't Rep., Feb. 1989, at 49 [hereinafter *Western*].

¹³*Waste-Watching*, *supra* note 9, at 44, col. 1. The OECD decisions regarding the export of hazardous waste are discussed *infra* at Part V(A).

¹⁴*Greenhouse, U.N. Conference Supports Curbs on Exporting of Hazardous Waste*, New York Times, Mar. 23, 1989, at B-11, col. 1.

¹⁵Kelly, *supra* note 1, at 96.

¹⁶*Delegates of 50 Countries Fail to Agree on Draft Covering Movement of Toxic Wastes*, Int'l Env't Rep., Feb. 1989, at 49.

¹⁷Aepfel, *supra* note 5, at col. 5. The United States-Canada treaty regarding the export of hazardous waste is discussed *infra* at Part IV(B).

¹⁸*Waste-Watching*, *supra* note 9, at 44, col. 1.

¹⁹Aepfel, *supra* note 5, at col. 4.

accounts for over 600,000 tons.²⁰ Much of West Germany's hazardous waste is shipped to a single facility in East Germany.²¹ To earn hard currency, East Germany has been accepting one to two million tons annually of household waste from all over Europe at fifty to eighty dollars per ton. Hundreds of trucks daily deliver this waste to a 500-acre open-air dump in Schonberg, right across the border from Lubeck, West Germany. The citizens of Lubeck are now worried about this waste contaminating their water.²²

The major problem, however, is the export of hazardous waste from developed countries to developing countries, particularly some of the poorer countries in Africa, the Middle East, and Latin America.²³ There have been several notorious incidents involving the export of hazardous waste to the third world, particularly to West Africa.²⁴ In some instances, the waste has been secretly dumped. For example, Madagascar has found barrels of toxic waste dumped off its beaches.²⁵

In other cases, an agreement is involved. In several African dumping schemes documented by Greenpeace, companies disposed of hazardous waste by delivering it to people clearly unqualified to dispose of it. In one scheme, from 1987 to 1988 an Italian firm paid the owner of a small construction firm in the tiny Nigerian port of Koko \$100 per month to rent his yard. Subsequently, 8000 leaking barrels of hazardous waste were found in the yard, and several people were arrested.²⁶ And in 1988 a Norwegian shipping company dumped 15,000 tons of so-called raw material for bricks on the island of Kassa in Guinea. When Greenpeace informed the Guinean government that the waste might be hazardous in Guinea's wet climate, and vegetation on the island suddenly started dying, it was determined that the material was really toxic incinerator ash from the United States. Authorities arrested the Norwegian consul-general, who had authorized the import, and ordered the waste removed.²⁷

²⁰*Waste-Watching*, *supra* note 9, at 50.

²¹Aepfel, *supra* note 5, at col. 5.

²²Aepfel, *West Pays Price for Dumping on East*, *Christian Science Monitor*, Feb. 10, 1989, at 4, col. 2; *Waste-Watching*, *supra* note 9, at 44, col. 2.

²³Letter (mass mailed) from Peter Bahouth, Executive Director, Greenpeace, discussing *Global Toxics Survey* (Mar. 1989).

²⁴Moghalu, *Nigeria Gets Tough on Toxic Dumping*, *Christian Science Monitor*, Mar. 31, 1989, at 6, col. 2.

²⁵Aepfel, *supra* note 5, at col. 4.

²⁶Moghalu, *supra* note 24, at col. 1; *Waste-Watching*, *supra* note 9, at 44, col. 2.

²⁷Moghalu, *supra* note 24, at col. 2; *Philadelphia Incinerator Ash Ordered Out of Guinea*, *Env't Rep.*, May 20, 1988, at 85.

In perhaps the most notorious incident recorded by Greenpeace, the ship *Khian Sea* tried to port in fifteen countries on five continents to unload incinerator ash from Philadelphia.²⁸ The ship tried to pass off the ash as fertilizer to Haitian farmers, but was exposed by Greenpeace.²⁹ It managed to unload about 20,000 tons before being ordered to leave with about 10,000 tons still on board. After being refused entry by numerous countries during the course of over a year, the ship changed owners and registry and twice changed its name. The ship finally reappeared off Singapore with its holds empty.³⁰

One of the main techniques used by hazardous waste exporters is to characterize the waste disposal plan as a development plan. For example, in 1988 a United States company proposed to build an incinerator in Panama to burn one-third of New York City's garbage, about 9,000 tons daily. The plan was worth \$12,000,000 per year and would have created 600 jobs in an economically depressed region. However, there were several discrepancies. The plan called for generating electricity with heat from the plant, which was impossible, and the waste began arriving three months before building of the incinerator commenced. When the Panamanian health minister threatened to resign, the plan was finally rejected.³¹ Bribery is another technique. A Panamanian government official stated that he was offered a beach house if he would approve a project to import huge piles of incinerator ash, including highly toxic dioxin, from the United States.³²

B. INTERNATIONAL REACTION TO THE PROBLEM

The exposure of hazardous waste export activities has led to a tremendous reaction worldwide. In several cases, the importing countries have required the re-export of the hazardous waste.³³ For example, in 1987, after Italian hazardous waste was unloaded in Venezuela, some barrels began leaking, endangering local water services and causing beaches to be closed. Venezuela ordered the wastes

²⁸*Waste-Watching*, *supra* note 9, at 43, col. 3.

²⁹Bahouth, *supra* note 23, at 2.

³⁰Cody, *105 Nations Back Peaty on Toxic Waste Shipping*, Washington Post, Mar. 23, 1989, at A-1, col. 4.

³¹Aepfel, *Tricks of the Trade for Unloading Garbage*, Christian Science Monitor, Mar. 24, 1989, at 4, col. 1.

³²*Id.*

³³*Greenpeace*, *supra* note 11, at 472.

removed. They were subsequently unloaded in Syria, which also required re-export. Finally, the wastes were returned to Italy, where port workers struck in protest.³⁴ In another case in January 1989, 14,000 barrels of hazardous waste were returned to Italy aboard the *Karin B*, months after they were illegally dumped in Nigeria. The Italian government estimated the cost of disposal at \$8,000,000, and stated that only 15% of Italy's refuse is disposed of properly, with the remaining 85% being dumped in illegal sites throughout Italy and the third world.³⁵

An additional reaction has been the cancellation or outright rejection of deals for export of hazardous waste by developing countries. In early 1988, Guinea-Bissau, with a gross national product of only \$150 million per year, cancelled a contract to accept twelve million tons of hazardous waste over five years at \$120 million per year.³⁶ Also in 1988, the government of Benin canceled a \$12.5 million deal with a European company to accept export of hazardous waste from the United States and Europe.³⁷ Despite these actions, the governments of developing countries have recognized that they simply do not have the mechanisms to control the import of hazardous waste.³⁸

Because of the growing problem of export of hazardous waste, several solutions have been proposed. Greenpeace has stated that the only real solution to toxic pollution is to prevent production of toxic waste in the first place.³⁹ Alternatively, Greenpeace has proposed a strict worldwide ban on the export of hazardous waste, since it maintains that no system can adequately safeguard human health and the environment.⁴⁰

The Luxembourg minister of the environment has noted, however, that it would be impossible to stop shipments immediately, and that to do so could lead to black marketing. Rather, he called for a reduction in generation of hazardous waste, strong export controls, and improved waste disposal and recycling capabilities in both developed and developing countries.⁴¹

³⁴Aepfel, *supra* note 5, at col. 1.

³⁵*14,000 Barrels of Toxic Waste Returned to Italy after Illegal Dumping in Nigeria*, Int'l Env't Rep., Jan. 1989, at 10 [hereinafter *14,000 Barrels*].

³⁶Moghalu, *supra* note 24, at col. 2; Aepfel, *supra* note 5, at col. 5.

³⁷Cody, *supra* note 30, at A-32, col. 5.

³⁸Aepfel, *supra* note 5, at col. 3.

³⁹Bahouth, *supra* note 23, at 2.

⁴⁰Greenpeace, *supra* note 11, at 472.

⁴¹*Draft Report of the Ad Hoc Working Group on the Work of Its Fourth Session*, UN Doc. No. UNEP/WG.190/L.1/Rev.1, Feb. 2, 1989, at 3 [hereinafter *Draft*].

One commentator has suggested that the adequacy of the disposal facility be no less than the exporting country's standards, including operation, management, and appropriate worker protections.⁴² This would provide equally strong environmental protection worldwide, ensure minimization of hazardous waste production, require the polluter to pay in advance, and avoid the subsequent problem of determining liability for cleanup.

Reaction from third world countries, particularly in Africa, has been even stronger. In May 1988, during the voyage of the *Khian Sea*, an Organization for African Unity (OAU) resolution stated: "We declare that the dumping of industrial and nuclear wastes in Africa is a crime against Africans, and we condemn all companies that participate . . . in introducing these wastes into Africa. We ask them to clean up the areas already polluted."⁴³

In June 1988 the Economic Community of West Africa decided to enact national laws making it a criminal offense to facilitate dumping of hazardous wastes.⁴⁴ All sixteen members have now enacted laws regarding the import of hazardous waste.⁴⁵ The Community has also established a 'Dump Watch' information-sharing system regarding the movement of hazardous waste-carrying vessels.⁴⁶

In particular, Nigeria, because of the Koko incident, enacted a Harmful Waste Decree, providing for life imprisonment for anyone found guilty of dumping hazardous waste in Nigeria.⁴⁷ After enacting the legislation, Nigeria also declared that any further dumping would be considered a hostile act.⁴⁸ Nigeria has also stated that it will establish a federal environmental protection law and an environmental protection commission. In this connection, analysts have noted that several other industrializing nations will soon be producing their own hazardous wastes and will need national agencies to regulate disposal.⁴⁹

⁴²Helfenstein, *supra* note 2, at 789.

⁴³Moghalu, *supra* note 24, at col. 2; *Philadelphia Ash Ship Heads for Africa Amid New Round of International Protest*, Env't Rep., June 17, 1988, at 227.

⁴⁴*Report of the Ad Hoc Working Group on the Work of Its Third Session*, United Nations Environment Program, UN Doc. No. UNEP/WG.189/3, Nov. 16, 1988, at 5 [hereinafter *Report*].

⁴⁵Moghalu, *supra* note 24, at col. 1.

⁴⁶*Report*, *supra* note 44, at 5.

⁴⁷Moghalu, *supra* note 24, at col. 1.

⁴⁸*Report*, *supra* note 44, at 5.

⁴⁹Moghalu, *supra* note 24, at col. 1.

The African community as a whole, however, has been unable to develop a unified plan. Following a January 1989 meeting of African environmental ministers, attended by representatives of thirty African countries and twelve Western countries, the representatives were unable to agree on a final communique. The ministers stated that they were unable to solve the problem of transboundary waste movement, and demanded massive Western aid for this purpose.⁵⁰

Other developing countries have had similar discussions. In July 1988 the Zone of Peace and Co-Operation of the South Atlantic discussed enacting national laws making it a criminal offense to facilitate dumping of hazardous wastes.⁵¹ And in late 1988, following a meeting in Cyprus of the non-aligned countries, the group asked for protection against the movement and dumping of hazardous waste.⁵²

Western countries have also reacted to the problem. For example, in the United States in 1986, two American businessmen were indicted for illegally dumping hazardous wastes in Mexico.⁵³ In June 1988 the economic summit of the seven major industrialized nations emphasized environmental concerns in its final communique.⁵⁴ And in September 1988, following a strike by port workers against the forced return of hazardous waste to Italy, as well as several other hazardous waste scandals, Italy declared a temporary ban on the export of hazardous waste.⁵⁵ In January 1989 Italy introduced legislation to prevent recurrence of international dumping of hazardous waste.⁵⁶ Environmental issues have also begun to play major roles in national politics in such countries as the United States, Great Britain, and Sweden.⁵⁷

Local authorities also have reacted to the problem. The town of Lubeck, West Germany, just across the border from the huge dump at Schonberg, East Germany, has filed over 230 lawsuits against West German state governments that send waste to Schonberg, charging that shippers do not handle the waste according to West German regulations.⁵⁸

⁵⁰*Western, supra* note 12, at 49.

⁵¹*Report, supra* note 44, at 5.

⁵²*Id.* at 2.

⁵³*Maes, supra* note 3, at 942. United States legislation regarding the export of hazardous waste is discussed *infra* at Part IV.

⁵⁴*Report, supra* note 44, at 2. European Economic Community legislation regarding the export of hazardous waste is discussed *infra* at Part III.

⁵⁵*Aeppl, supra* note 5, at col. 1.

⁵⁶*14,000 Barrels, supra* note 35, at 10.

⁵⁷*Report, supra* note 44, at 2.

⁵⁸*Aeppl, supra* note 22, at col. 3.

Finally, the growing problem of export of hazardous waste has led to the involvement of international organizations. In 1985 the UNEP issued the draft Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, including import consent and export notification requirements.⁵⁹ The guidelines were subsequently approved in June 1987.⁶⁰ In November 1988 the United Nations (UN) General Assembly debated the issue of hazardous waste at its Plenary Session of Heads of State and Government and Ministers of Foreign Affairs. The UN also addressed the issue in two major subcommittees, the Political Committee and the Economic Committee.⁶¹

In July 1988, Barber Conable, the President of the World Bank, stated the Bank's policy of not financing projects involving the disposal of hazardous waste, including shipment to or disposal of hazardous waste in any developing country. The Bank will allow the export of hazardous waste only after prior consent by the recipient or upon acceptable certification and utilization of environmentally sound transit, storage, and disposal methods.⁶²

Proposed solutions have also included the establishment of new international organizations. In June 1988 Egypt proposed at a UN meeting that a task force be formed to assist developing countries in improving their technical capacity to deal with hazardous waste by providing not only advice but assistance upon request.⁶³ At a UN meeting later that year, a representative from the Chemical Manufacturers Association proposed development of an Environmental Training Network to function as a coordinating center for environmental training projects because of significant overlap between groups currently conducting training.⁶⁴

111. EUROPEAN ECONOMIC COMMUNITY LAW REGARDING EXPORT OF HAZARDOUS WASTE

The Treaty of Rome, which established the European Economic Community (EEC) in 1957, does not specifically cover environmen-

⁵⁹United Nations Environment Program, U.N. Doc. No. EP/WG.122/L.1/Add.3/Rev.1 (1985).

⁶⁰*Draft*, *supra* note 41, at 1.

⁶¹*Report*, *supra* note 44, at 2. The UN-sponsored international treaty regarding the export of hazardous waste is discussed *infra* at Part V(B).

⁶²*Id.* at 6.

⁶³*Id.* annex II, at 1.

⁶⁴*Id.* at 6.

tal problems.⁶⁵ However, with increasing worldwide awareness of environmental problems since the late 1960's, the EEC has begun formulating an environmental policy. The effort began with the Directive on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste⁶⁶ (the EEC Directive) in 1987.⁶⁷ Member states used ad-hoc bilateral arrangements to control the transfrontier shipment of hazardous waste. However, these agreements were not successful in tracking and controlling shipments.⁶⁸

In July 1987 the Single European Act added a general environmental protection policy, including control of transfrontier shipment of hazardous waste, to the EEC treaty.⁶⁹ The basis of the policy is the principle that the polluter pays to remedy the effects of pollution.⁷⁰ Although there have been controversies regarding the legal foundation of environmental action, difficulties in coordinating community-wide environmental action, and problems with some states in implementing environmental actions, environmental protection is a high priority within the EEC.⁷¹

One specific incident highlighted the need for community-wide environmental laws. In 1976 a factory explosion in Italy resulted in the removal of dioxin-contaminated hazardous waste from the site. In 1983 forty-one barrels of this waste were found in a barn in Northern France, having crossed the border undetected. This incident provided a political motivation for the passage of the EEC Directive.⁷² The proposed EEC Directive was initially submitted to member states in 1983, but was subsequently narrowed by several changes before passage.⁷³ The EEC Directive finally became effective in January 1987.⁷⁴

The purpose of the EEC Directive is to decrease risks resulting from the transfrontier shipment of hazardous waste.⁷⁵ The EEC Directive

⁶⁵Kelly, *supra* note 1, at 88.

⁶⁶27 O.J. Eur. Comm. (No. L 326) 31 (1984) [hereinafter EEC Directive].

⁶⁷Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 Eur. L. Rev. 408 (1987).

⁶⁸Kelly, *supra* note 1, at 96.

⁶⁹Vandermeersch, *supra* note 67, at 407.

⁷⁰*Id.* at 415.

⁷¹Kelly, *supra* note 1, at 88.

⁷²*Id.* at 95.

⁷³*Id.* at 97-98.

⁷⁴The EEC Directive, *supra* note 66, art. 18.

⁷⁵Kelly, *supra* note 1, at 87.

is based on article 100 of the Treaty of Rome.⁷⁶ Under article 100, the Council of European Communities must act unanimously. Three types of actions under the Treaty of Rome bind member states: regulations; decisions; and directives. Recommendations and opinions are not binding. A directive binds all members, who must implement it through national legislation or administrative action.⁷⁷

The EEC Directive establishes a "closed-cycle" tracking system for export of hazardous waste, i.e., governmental authorities receive prior notice of shipments, may set conditions for shipment, and receive notification of arrival at an authorized site.⁷⁸ The system applies to shipments within the EEC, as well as exports from or imports into the EEC.⁷⁹

Under the EEC Directive, hazardous waste includes any waste defined as hazardous waste by a member state.⁸⁰ However, it specifically excludes several types of waste.⁸¹ One problem is that there is no readily available list of waste that each member considers to be hazardous.⁸² Where the waste is for reuse or recycling, it is exempt from all requirements except the manifest requirement (discussed below).⁸³

The waste exporter must provide prior notification of dispatch, transit, and destination to competent authorities in member and non-member states.⁸⁴ Prior notification includes: 1) identity of producer; 2) source and composition of the waste; 3) information regarding insurance; 4) transport measures; and 5) contract with a capable consignee having adequate technical disposal capacity.⁸⁵

Shipment may not be made before the destination member state acknowledges receipt of notification.⁸⁶ The destination member state has thirty days to do so.⁸⁷ A general notification procedure may be

⁷⁶The EEC Directive, *supra* note 66, at Preamble.

⁷⁷*Id.* art. 189.

⁷⁸Kelly, *supra* note 1, at 87.

⁷⁹*Id.* at 98.

⁸⁰The EEC Directive, *supra* note 66, art. 1(a), (b).

⁸¹Excluded wastes include household waste, hospital waste, radioactive waste, mining waste, explosives, animal carcasses and agricultural waste of fecal origin, effluent discharged into sewers and watercourses, and other dangerous and toxic waste covered by specific EEC rules. Kelly, *supra* note 1, at 99 n.93.

⁸²*Id.* at 99.

⁸³The EEC Directive, *supra* note 66, art. 17.

⁸⁴*Id.* art. 3(1).

⁸⁵*Id.* art. 3(3).

⁸⁶*Id.* art. 4(1).

⁸⁷*Id.* art. 4(2).

used for several shipments within a year.⁸⁸ Objections may be made by the destination member state or the generator member state.⁸⁹ Member states may impose only conditions on shipment,⁹⁰ and it is not clear whether the state of transit may absolutely bar shipment.⁹¹ Objections must be based on environmental or health concerns consistent with EEC law.⁹² Objections may result in prohibition of shipment or shipment subject to certain conditions.⁹³ Shipments by member states to non-member states require prior consent.⁹⁴

All shipments must be accompanied by a manifest.⁹⁵ The manifest must be signed by the producers, transporters, and disposers of the waste, and when the waste reaches the final destination a copy must be forwarded to the appropriate governmental authorities.⁹⁶ The manifest is the key document for notification and tracking of these shipments of hazardous waste.⁹⁷

The EEC Directive requires all shipments of hazardous waste to be properly packaged and labeled, and accident instructions are also required.⁹⁸ However, the EEC Directive's lack of specific uniform packaging and labeling instructions has been criticized as being likely to lead to compliance problems, especially if member states impose conflicting requirements.⁹⁹

The consignee must possess adequate technical capacity to dispose of the waste under conditions presenting no danger to human health and the environment. Furthermore, if the consignee is in a member state, it must have a proper permit.¹⁰⁰ In addition, for non-EEC consignees, the shipper of the waste must verify arrival at the final destination within six weeks after the shipment leaves the EEC.¹⁰¹

⁸⁸*Id.* art. 5.

⁸⁹*Id.* art. 4(3), 4(6).

⁹⁰*Id.* art. 4(3).

⁹¹Kelly, *supra* note 1, at 106.

⁹²The EEC Directive, art. 4(3).

⁹³Kelly, *supra* note 1, at 98.

⁹⁴The EEC Directive, *supra* note 66, art. 3(4).

⁹⁵*Id.* art. 3(1), 3(2), 6(2), annex I.

⁹⁶*Id.* art. 6. 7.

⁹⁷Kelly, *supra* note 1, at 98.

⁹⁸The EEC Directive, *supra* note 66, art. 8.

⁹⁹Kelly, *supra* note 1, at 108.

¹⁰⁰The EEC Directive, *supra* note 66, art. 3(3).

¹⁰¹Halter, *Regulating Information Exchange and International Trade in Pesticides and Other Toxic Substances to Meet the Needs of Developing Countries*, 1% Colum. J. Envtl. L. 1, 18 (1987).

The EEC Directive does not require annual reporting by producers, holders, or disposers of hazardous waste. Member states, however, must submit biennial reports regarding their implementation of the EEC Directive.¹⁰²

Underlying the EEC Directive is the "polluter pays" principle. Under it, the costs of implementing the notification and supervision provisions, including necessary analysis and controls, are borne by the producer and holder of the waste.¹⁰³ Additionally, the producer of the waste is required to take all necessary steps to dispose of the hazardous waste in an environmentally safe manner.¹⁰⁴ Violations may result in civil liability for damages under the EEC Directive.¹⁰⁵

Overall, the EEC Directive has been praised as establishing an effective closed-cycle tracking system that may reduce the potential for harm to human health and the environment.¹⁰⁶ However, it has also been criticized for having several deficiencies. First, there are no procedures for response to accidents or spills during transit, nor is notification of such required.¹⁰⁷ However, it does allow member states to establish their own accident procedures.¹⁰⁸ Second, the EEC Directive does not require insurance for export of hazardous waste.¹⁰⁹ The EEC Directive also delays action on the issue of liability for damages resulting from hazardous waste exports.¹¹⁰ Finally, the EEC system has been criticized for its lack of uniformity of hazardous waste treatment and disposal regulations. The major cause of export of hazardous waste in the EEC is precisely this ability to freely export hazardous waste across borders!"

¹⁰²The EEC Directive, *supra* note 66, art. 13.

¹⁰³*Id.* art. 10.

¹⁰⁴*Id.* art. 11(1).

¹⁰⁵*Id.* art. 11(3). However, the scope of liability under the EEC Directive remains unclear. Kelly, *supra* note 1, at 113.

¹⁰⁶Kelly, *supra* note 1, at 88.

¹⁰⁷*Id.* at 112.

¹⁰⁸The EEC Directive, *supra* note 66, art. 4(5), 4(6).

¹⁰⁹Kelly, *supra* note 1, at 102.

¹¹⁰*Id.* at 88.

¹¹¹Williams, *A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste*, 14 B.C. Env'tl. Aff. 222 n.248 (1987).

IV. UNITED STATES LAW AND TREATIES REGARDING THE EXPORT OF HAZARDOUS WASTE

A. UNITED STATES LAW

In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA)¹¹² because of the growing need to deal with land disposal of solid waste and hazardous waste. RCRA establishes a regulatory program under the Environmental Protection Agency (EPA) to deal with hazardous waste from production to disposal. Pursuant to RCRA, EPA identifies and lists hazardous wastes.¹¹³

The RCRA definition of hazardous waste includes all solid wastes specifically listed,¹¹⁴ as well as those that exhibit certain characteristics (ignitability, corrosivity, reactivity, and toxicity).¹¹⁵ RCRA specifically exempts some small amounts of hazardous waste from regulation.¹¹⁶ RCRA also nominally regulates other hazardous wastes.¹¹⁷ RCRA does not include radioactive wastes as hazardous wastes,¹¹⁸ nor does it regulate disposal at sea of hazardous waste.¹¹⁹

In 1979 President Carter issued Executive Order No. 12,114, setting forth the requirements to analyze environmental impacts abroad, but not specifically requiring export permits.¹²⁰ Then in 1981, following a controversy regarding exporting dangerous products, President Carter issued Executive Order No. 12,264,¹²¹ establishing export procedures for certain products restricted or banned in the United States, including hazardous substances and chemical mixtures. However, President Reagan revoked the order the next month with Executive Order No. 12,290.¹²²

¹¹²Pub. L. No. 94-580, 90 Stat. 2795 (1976), *codified as amended at* 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1987).

¹¹³Maes, *supra* note 3, at 942.

¹¹⁴40 C.F.R. §§ 61.3, 261.11, 261.30-261.33 (1987).

¹¹⁵*Id.* §§ 261.3, 261.10, 261.20-261.24.

¹¹⁶*Id.* §§ 261.6, 261.7 (residues), 261.2 (commercial chemical products recycled in a particular manner).

¹¹⁷*Id.* §§ 261.4(d) (samples for testing), 261.5 (small quantity generators)

¹¹⁸*Id.* § 261.4(a)(4).

¹¹⁹Helfenstein, *supra* note 2, at 776.

¹²⁰44 Fed. Reg. 1957 (1979), 3 C.F.R., 1979 Comp., at 356, *reprinted in* 42 U.S.C. § 4321 (1982).

¹²¹46 Fed. Reg. 4,659 (1981).

¹²²46 Fed. Reg. 12,943 (1981); Helfenstein, *supra* note 2, at 778.

Although RCRA did not expressly cover export of hazardous waste, in 1980, based on RCRA standards applicable to generators and transporters of these substances, EPA promulgated limited regulations regarding the export of hazardous waste.¹²³ The 1980 EPA regulations required: 1) exporters to notify EPA each year before initial shipment of hazardous waste to each country by identifying the waste and the consignee;¹²⁴ 2) exporters to mark the date of export on the manifest;¹²⁵ and 3) generators to get confirmation of delivery from the consignee.¹²⁶ The 1980 regulations also contained labeling and record-keeping requirements.¹²⁷ EPA undertook the responsibility to notify the foreign government.¹²⁸

These regulations were criticized as being inadequate. Although the same general record-keeping requirements applied to domestic and exported hazardous waste, the export regulations did not require reporting of the quantity of waste, frequency of shipment, or manner of transportation or treatment outside the United States. Moreover, EPA had no authority to prohibit the export of any hazardous waste rejected by a foreign country.¹²⁹

Between 1980 and 1985 the number of export notifications issued by EPA for exports of hazardous waste increased dramatically. In 1980 only twenty notices were issued, rising to 380 in 1985. The five-year total was **823** notices, with 90% to Canada, **6%** to Europe, and 4% to Asia and Latin America.¹³⁰

In 1984 EPA acquired authority to control hazardous waste exports and to coordinate notification with the State Department, following congressional concern regarding loopholes in the control of hazardous waste and the potential for foreign policy and environmental problems.¹³¹ This led to the passage of the Hazardous and Solid Waste Amendments of 1984 (HWSA).¹³² The Senate expressed concern that the existing notification system was inadequate to address human health, the environment, and foreign policy problems.¹³³ The amend-

¹²³45 Fed. Reg. 12,732, 12,743-44, *codified at* 40 C.F.R. pts. 262-263 (1987).

¹²⁴40 C.F.R. pt. 262, subpt. E (1986).

¹²⁵*Id.* at pt. 263.

¹²⁶*Id.* at pt. 262, subpt. E.

¹²⁷*Id.* § 262.50(b)(1).

¹²⁸Halter, *supra* note 101, at 13.

¹²⁹Maes, *supra* note 3, at 945; Helfenstein, *supra* note 2, at 779.

¹³⁰Halter, *supra* note 101, at 13.

¹³¹S. Rep. No. 98-284, 98th Cong., 1st Sess. 47 (1983).

¹³²Pub. L. No. 98-616, 98 Stat. 3224 (1984), *codified as amended in scattered sections of* 42 U.S.C.

¹³³S. Rep. No. 98-284, *supra* note 131, at 47.

ments also expressed a belief that to protect their wishes and interests, foreign nations should give consent before import of hazardous waste.¹³⁴ Specifically, the Senate expressed concerns that under the current regulations, notification did not include the amount of waste to be exported, the frequency of export, ports of entry overseas, or methods of storage, treatment, or disposal.¹³⁵ The Senate projected that this information would assist the legislative branch in determining the amount and destination of export of hazardous waste, in order to determine whether additional controls were necessary.¹³⁶ Finally, the Senate suggested that EPA work with the Customs Service to establish effective regulation to monitor international shipments for compliance and to ensure vigorous pursuit of violations.¹³⁷ The House of Representatives concurred that prior consent was necessary to avoid the dumping of hazardous waste in unsuspecting countries, and it cited several cases, including the dumping of PCB's in Mexico and Honduras.¹³⁸ The Senate and House agreed on the amendments.¹³⁹ Otherwise, there was very little explanation, and legislative history was considered minimal by one commentator.¹⁴⁰

In August 1986 EPA published final regulations regarding the export of hazardous waste under the amendments.¹⁴¹ In addition to domestic concerns, two Organization for Economic Cooperation and Development (OECD) decisions provided reference for the regulation~!*The HWSA regulations prohibit the export of hazardous waste unless: 1)the exporter notifies EPA; 2) the receiving country consents to accept the waste; 3) a copy of the consent is attached to the manifest accompanying shipment; and 4)the shipment conforms to the terms of the consent.¹⁴³ Each of these requirements is discussed in more detail in the following paragraphs.

HWSA export controls, with one minor exception, apply only to the extent that hazardous waste is regulated by EPA, i.e., waste re-

¹³⁴S-9152, 130 Cong. Rec. 59,152 (daily ed. July 25, 1984).

¹³⁵S. Rep. No. 98-284, *supra* note 131, at 47.

¹³⁶S-9152, *supra* note 135, at 59,152.

¹³⁷S. Rep. No. 98-284, *supra* note 131, at 47.

¹³⁸H-8163, 129 Cong. Rec. H8163 (daily ed. Oct. 6, 1983).

¹³⁹Legislative History, P.L. 98-616, 1984 U.S. Code Cong. & Admin. News 5686 (1984).

¹⁴⁰Helfenstein, *supra* note 2, at 780.

¹⁴¹51 Fed. Reg. 28,664 (1986) (amending 40 C.F.R. pts. 260, 262, 263 and 271 (1985)). The regulations became effective in November 1986. *Id.*

¹⁴²Helfenstein, *supra* note 2, at 781. The OECD decisions are discussed *infra* at Part V(A).

¹⁴³42 U.S.C. § 6938 (Supp. V 1987).

quiring an EPA manifest domestically.¹⁴⁴ HWSA prohibits any person from exporting hazardous waste until EPA has been notified. Notification must include: 1) name and address of exporter; 2) types and estimated quantities of hazardous waste to be exported; 3) estimated frequency of export, and period of time for export; 4) ports of entry; 5) description of the manner that the hazardous waste will be transported, treated, stored, and disposed of in the receiving country; and 6) the name and address of the ultimate treatment, storage, or disposal facility.¹⁴⁵

Under the regulations, primary exporters are directly responsible for timely, complete, and accurate notification to EPA regarding the proposed export of hazardous waste.¹⁴⁶ Primary exporters are those who initially export hazardous waste and brokers who arrange for foreign management of hazardous waste, but not those who merely provide transportation between facilities.¹⁴⁷ The exporter's notification to EPA covers intended shipments of a particular hazardous waste for twelve months.¹⁴⁸ Renotification to both transit and receiving countries and consent from receiving countries is required for any changes made under the notification, except for the mode of transportation, type of container, or a decrease in the quantity of waste.¹⁴⁹

Before shipment, consent of the receiving country is required.¹⁵⁰ The procedure is as follows: 1) EPA forwards completed notification to the State Department for transmission to the U.S. embassy in the receiving or transit countries; 2) the U.S. embassy forwards that information to the appropriate authorities; 3) the embassy forwards the response to the State Department; 4) the State Department notifies EPA; and 5) EPA notifies the exporter.¹⁵¹ EPA requests sixty-days' prior notification by the exporter, but this is only an estimate of the time required, as consent of the receiving country is a prerequisite.¹⁵²

¹⁴⁴40 C.F.R. §§ 262.50, 262.51 (1987). The exception is spent industrial ethyl alcohol, exempt from EPA regulations because it is covered by Bureau of Alcohol, Tobacco, and Firearms domestically, but subject to HWSA export controls when exported for reclamation. 40 C.F.R. §§ 261.6(a)(3)(i) (1987).

¹⁴⁵42 U.S.C. § 6938 (1982 & Supp. V 1987).

¹⁴⁶40 C.F.R. §§ 262.53(a), 262.54 (1987).

¹⁴⁷*Id.* § 262.51.

¹⁴⁸*Id.* § 262.53(a).

¹⁴⁹*Id.* § 262.53(c).

¹⁵⁰42 U.S.C. § 6938 (1982 & Supp. V 1987).

¹⁵¹40 C.F.R. § 262.53(b), (c), (e), (f) (1987).

¹⁵²Helfenstein, *supra* note 2, at 783.

Primary exporters are responsible for compliance with the prior consent requirement for any country where the waste is sent for disposal, treatment (including recycling), or storage (except temporary storage incident to transportation).¹⁵³ A copy of the consent must accompany the hazardous waste shipment, attached to the manifest.¹⁵⁴ Primary exporters must identify, and EPA must notify, any transit countries through which the hazardous waste will travel, but consent is not required.¹⁵⁵

Primary exporters are required to make specific efforts to verify that the waste went where it was intended to go.¹⁵⁶ Further, they must ensure that the handling of the waste conforms to the terms of shipment.¹⁵⁷

Finally, primary exporters must file an annual report with EPA summarizing the types, quantities, frequency, and destination of all exported hazardous waste.¹⁵⁸ This enables EPA to track these statistics for all reported exported hazardous waste.¹⁵⁹

Transporters (who arrange only for transportation) also have several responsibilities. They must deliver a copy of the manifest to U.S. Customs when the waste is exported, and must ensure that the manifest and consent accompany the waste. They must also refuse to export hazardous waste if they know it does not conform to the terms of the consent.¹⁶⁰

HWSA provides for criminal penalties for knowingly exporting hazardous waste in violation of its requirements.¹⁶¹ The regulations provide that primary exporters, including their employees, are subject to criminal penalties for knowingly violating export regulations.¹⁶² Transporters, who must refuse to export hazardous waste if they know it does not conform to the terms of the consent, cannot escape criminal liability by being willfully blind to the nonconformity.¹⁶³ Regarding civil liability, RCRA is generally interpreted to impose strict

¹⁵³40 C.F.R. § 262.51.

¹⁵⁴*Id.* § 262.54(b).

¹⁵⁵*Id.* §§ 262.52(b), 262.52(a)(2)(iv), (viii), 262.53(e), (f) (1987).

¹⁵⁶*Id.* §§ 262.54(f), 262.55.

¹⁵⁷*Id.* § 262.52(d).

¹⁵⁸*Id.* § 262.56.

¹⁵⁹Halter, *supra* note 101, at 13.

¹⁶⁰40 C.F.R. § 263.20.

¹⁶¹42 U.S.C. § 6928(d), (e) (1982 & Supp. V 1987).

¹⁶²40 C.F.R. § 262.56(a)(6).

¹⁶³*United States v. Hayes Int'l. Corp.*, 786 F.2d 1499 (11th Cir. 1986).

liability for cleanup of releases on generators and some transporters and storers of hazardous waste, subject to certain statutorily defined defenses.¹⁶⁴

The above EPA requirements regarding export of hazardous waste do not apply if the United States has an international agreement with the country concerned. If there is an international agreement regarding the export of hazardous waste, the shipment must conform to that agreement.¹⁶⁵ Although in 1984 at the time of the HWSA amendments there were no such agreements, since then bilateral agreements have been signed with Canada and Mexico.¹⁶⁶ The EPA has expressed a preference for bilateral agreements over shipment-by-shipment arrangements.¹⁶⁷ In addition, ratification of the recent international treaty regarding the export of hazardous waste may affect the above rules.¹⁶⁸

The HWSA addition to RCRA of requiring prior consent of the importing country has been cited as a significant improvement to United States hazardous waste management policy.¹⁶⁹ However, it has been criticized in comparison with the EEC Directive, because: 1) the exporter must rely on the United States to relay notification and consent, thus causing unnecessary delay; and 2) the EEC provides a much stronger tracking system with strict liability for the producer, thus making identification of and recovery from violators easier.¹⁷⁰

Moreover, an internal Inspector General audit of EPA's program to control export of hazardous waste indicated that the program needs major improvements. The report found that hundreds of tons of hazardous waste are exported without prior notification filed with EPA, and it criticized EPA for having no system to monitor the export of hazardous waste. The report noted, however, that EPA was aware of the problem and was developing a program to remedy the deficiency. Congress has also criticized EPA's hazardous waste export program.¹⁷¹

¹⁶⁴Kelly, *supra* note 1, at 126.

¹⁶⁵42 U.S.C. § 6938(f) (1982 & Supp. V 1987).

¹⁶⁶Helfenstein, *supra* note 2, at 789. The agreements with Canada and Mexico are discussed *infra* at Part IV(B).

¹⁶⁷*U.S. Would Tie Toxic Waste Exports to Bilateral Agreements*, Thomas Says, *Env't Rep.*, Sep. 16, 1988, at 994.

¹⁶⁸The international treaty is discussed *infra* at Part V(B).

¹⁶⁹Kelly, *supra* note 1, at 124.

¹⁷⁰*Id.* at 123, 127.

¹⁷¹*EPA's Program on Hazardous Waste Exports Needs improvement* \$ inspector General Says, *Env't Rep.*, July 22, 1988, at 390.

RCRA authorization expired in September 1988. Congress made no strong efforts at reauthorization during 1988,¹⁷² but it did include interim funding for 1989 in EPA appropriations bills.¹⁷³ In July 1988 a bill was introduced in the House to prohibit the export of hazardous waste except where there is an international agreement. Representative Conyers, who introduced the bill, criticized the current rules requiring consent of the receiving country as unworkable, considering the large sums of money offered to those countries and their officials to accept hazardous waste. Under the bill, hazardous waste would be defined as in RCRA, and EPA would develop and promulgate regulations to control the export of hazardous waste. Criminal penalties would include a \$50,000 fine and two years' confinement, doubled for the second offense.¹⁷⁴

In September 1988 Senator Baucus, Chairman of the Subcommittee on Hazardous Wastes and Toxic Substances, introduced a bill regarding the export of hazardous waste.¹⁷⁵ The bill would prohibit the export of hazardous waste unless there is an international agreement with the importing country and would require the importing country to manage the waste following United States environmental laws. Senator Baucus denounced the export of hazardous waste to developing countries, calling it "garbage imperialism." Although the bill was introduced too late in the session for action, it would set the tone for upcoming congressional debates on reauthorization.¹⁷⁶

B. BILATERAL TREATIES

1. *Treaty With Mexico*

In 1983 the United States and Mexico signed a general environmental agreement, the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (the Mexican Treaty), which entered into force in February 1984.¹⁷⁷ The agreement remains in effect indefinitely, but either party may withdraw upon

¹⁷²*Hazardous and Solid Waste* 18 Env'tl. L. Rep. 10,020 (1989).

¹⁷³*RCRA Reauthorization Bill*, 18 Env'tl. L. Rep. 10,496 (1988).

¹⁷⁴*Bill Introduced in House to Block U.S. Export of Hazardous, Municipal Wastes, Incinerator Ash*, Env't Rep., July 15, 1988, at 366.

¹⁷⁵S-2773, 100th Cong., 2d Sess. (1988), 134 Cong. Rec. S12171, S12172 (daily ed. Sep. 9, 1988).

¹⁷⁶*Waste Export Bill Introduced to Require Importing Country to Meet U.S. Standards*, Env't Rep., Oct. 7, 1988, at 1158.

¹⁷⁷Mexican Treaty, art. 19, T.I.A.S. 10827.

six months' written notice.¹⁷⁸ The agreement provides that the parties may conclude specific arrangements, to be annexed to the agreement, for solutions to common problems in the border area.¹⁷⁹

Subsequently, in September 1986 the United States and Mexico agreed to combat the problem of export of hazardous waste by supplementing the 1983 agreement with Annex III to the Mexican Treaty¹⁸⁰ (the Mexican Annex).¹⁸¹ The Mexican Annex governs the transfrontier shipment of hazardous waste.¹⁸² It has been hailed as a major step in controlling the export of hazardous waste.¹⁸³ The Mexican Annex was signed in November 1986, and it provided that it would enter into force upon an exchange of notes between the parties.¹⁸⁴ The Mexican Annex specifically provides that it does not affect the parties' international agreements.¹⁸⁵ It continues indefinitely, but either party may withdraw upon six months' written notice.¹⁸⁶

Under the Mexican Annex, hazardous waste is defined as any waste so designated by either country.¹⁸⁷ EPA is designated as the United States authority under the Annex.¹⁸⁸ The Mexican Annex requires prior notification from EPA to the Mexican government for any export of hazardous waste for which consent is required.¹⁸⁹ Notice is required forty-five days before shipment, and it may cover individual shipments or a series of shipments up to one year.¹⁹⁰ Notification information must include: identity of the exporter; description of the hazardous waste; estimated frequency of shipment; estimated total quantity; means of transportation; port of entry; identity of consignee, and description of treatment or storage.¹⁹¹

The Mexican government has forty-five days from receipt of notification to respond, indicating its consent, including conditional consent, or its objection.¹⁹² However, unlike the Canadian treaty, discussed below, the Mexican Annex does not set forth a procedure

¹⁷⁸*Id.* art. 20.

¹⁷⁹*Id.* art. 3.

¹⁸⁰26 I.L.M. 25 (Jan 1987).

¹⁸¹Maes, *supra* note 3, at 944.

¹⁸²The Mexican Annex, *supra* note 180, art. 2(1).

¹⁸³Maes, *supra* note 3, at 947.

¹⁸⁴The Mexican Annex, *supra* note 180, art. 19.

¹⁸⁵*Id.* art. 15.

¹⁸⁶*Id.* art. 20.

¹⁸⁷*Id.* art. 1(2).

¹⁸⁸*Id.* art. 1(1).

¹⁸⁹*Id.* art. 3(1).

¹⁹⁰*Id.* art. 3(2).

¹⁹¹*Id.* art. 3(2).

¹⁹²*Id.* art. 3(4).

to follow if the importing country fails to respond within forty-five days.¹⁹³ The importing country may require that the export of hazardous waste be covered by insurance.¹⁹⁴ It may also modify or withdraw consent at any time.¹⁹⁵

The Mexican Annex provides that each party will ensure its domestic laws regarding export of hazardous waste are enforced¹⁹⁶ and that the parties will cooperate in monitoring shipments to ensure they conform to the law.¹⁹⁷ The Annex also requires that for illegal exports of hazardous waste, including those that violate law, regulations, or conditions of export, EPA will take all practicable steps to take legal action to : 1) return the hazardous waste to the exporting country; 2) return the ecosystem to the status quo; 3) repair damages to persons, property, and the environment; and 4) take all other legal actions.¹⁹⁸

2. *Treaty With Canada*

The Agreement between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste (the Canadian Treaty) became effective in November 1986.¹⁹⁹ It specifically takes into account the UNEP Cairo Guidelines (discussed previously) and the OECD decisions regarding the export of hazardous waste (discussed below). Canada, unlike Mexico, is a member of the OECD. The Canadian treaty is effective for five years, with automatic five-year renewals unless either party gives three months' prior written notice of termination, but it may also be terminated by either party on one year's written notice.²⁰⁰ It provides that the agreement is subject to the domestic law of both countries²⁰¹ and that it shall not diminish the effect of international agreements.²⁰²

The Canadian Treaty defines hazardous waste as including both United States and Canadian definitions.²⁰³ It allows the export, import, or transit of hazardous waste across the border for treatment, storage, or disposal pursuant to the treaty.²⁰⁴

¹⁹³Helfenstein, *supra* note 2, at 786.

¹⁹⁴The Mexican **Annex**, *supra* note 180, art 14(1)

¹⁹⁵*Id.* art. 3(6).

¹⁹⁶*Id.* art. 2(2).

¹⁹⁷*Id.* art. 2(3).

¹⁹⁸*Id.* art. 14(2).

¹⁹⁹The Canadian Treaty. art. 13.

²⁰⁰*Id.*

²⁰¹*Id.* art. 11.

²⁰²*Id.* art. 10.

²⁰³*Id.* art. 1(b).

²⁰⁴*Id.* art. 2.

Under the treaty, the exporting country notifies the importing country regarding proposed export of hazardous waste.²⁰⁵ Notice may be per shipment or annually. Notice must include: 1) identity of the exporter; 2) description of the hazardous waste; 3) estimated frequency of export; 4) total quantity; 5) date of shipment; 6) identity of shipper and mode of transportation; 7) port of entry; 8) identity of consignee; and 9) manner of treatment, storage, and disposal in the importing country.²⁰⁶ For transit countries, seven days' notice is required before shipment, providing information regarding the port of departure and entry and the length of stay.²⁰⁷ The importing country has thirty days to respond, indicating consent, including conditional consent, or objection.²⁰⁸ If there is no response within thirty days, it is considered that there is no objection.²⁰⁹

Shipments must meet manifest regulations of both countries.²¹⁰ In addition, the signatories may require insurance for export of hazardous waste.²¹¹ The exporting country is required to readmit any shipment of hazardous waste that is returned by the country of import or transit.²¹² Finally, the parties are required to issue implementing regulations as necessary²¹³ and to use domestic law to enforce provisions regarding transportation, storage, treatment, and disposal of exported hazardous waste.²¹⁴

V. INTERNATIONAL AGREEMENTS

A. OECD DECISIONS

The Organization for Economic Cooperation and Development (OECD) originated as a group of countries organized during the reconstruction of Europe after World War II. It now includes as members Australia, Austria, Belgium, Canada, Denmark, Finland, France, West Germany, Great Britain, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States.²¹⁵

²⁰⁵*Id.* art. 3(b).

²⁰⁶*Id.* art. 3(b).

²⁰⁷*Id.* art. 4.

²⁰⁸*Id.* art. 3(c).

²⁰⁹*Id.* art. 3(d).

²¹⁰*Id.* art. 5.

²¹¹*Id.* art. 9.

²¹²*Id.* art. 6.

²¹³*Id.* art. 5(3).

²¹⁴*Id.* art. 7.

²¹⁵Helfenstein, *supra* note 2, at 781.

The Convention of the Organization for Economic Cooperation and Development²¹⁶ (the OECD Treaty), signed in 1960, does not mention the environment. The OECD Treaty provides that decisions by member nations must be unanimous.²¹⁷ If a member abstains, the decision does not bind that member.²¹⁸ Although decisions are binding upon members unless otherwise provided,²¹⁹ a decision does not bind a member until it complies with its own national requirements.²²⁰ Finally, any member may terminate application of the treaty upon twelve months' notice.²²¹

The first OECD decision relating to the export of hazardous waste was the Decision and Recommendation of the OECD Council on Transfrontier Movements of Hazardous Waste²²² (the OECD Transfrontier Decision). Australia and Greece abstained from the decision.²²³ The OECD Transfrontier Decision appears to be the first international legal agreement adopted regarding the export of hazardous waste.²²⁴

The only true requirement in the OECD Transfrontier Decision is that the members must notify relevant countries regarding exports of hazardous waste.²²⁵ It also contains several principles regarding the export of hazardous waste and recommends considering additional international action.²²⁶ The OECD Transfrontier Decision has been criticized both because it is non-binding and because it is insufficiently detailed. For example, it does not include a list of hazardous wastes, does not specify permitting requirements, and does not refer to shipment to non-member countries. One commentator concluded that the OECD Transfrontier Decision probably did not establish a workable international notification and tracking system.²²⁷

Subsequently, in June 1986 the OECD issued the OECD Council Decision and Recommendation on Exports of Hazardous Wastes (the OECD Export Decision).²²⁸ It defines hazardous waste as all wastes

²¹⁶Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179.

²¹⁷*Id.* art. 6(1).

²¹⁸*Id.* art. 6(2).

²¹⁹*Id.* art. 5(a), (b).

²²⁰*Id.* art. 6(3).

²²¹*Id.* art. 17.

²²²23 I.L.M. 214 (1984).

²²³*Id.* at 214.

²²⁴*Id.*

²²⁵OECD Transfrontier Decision. art. I.

²²⁶23 I.L.M. at 215.

²²⁷Kelly, *supra* note 1, at 116-18.

²²⁸25 I.L.M. 1010 (1986).

considered or legally defined as hazardous waste in the country through or to which conveyed, but it excludes radioactive waste.²²⁹

The OECD Export Decision requires member countries to: 1) ensure that their authorities are empowered to prohibit the export of hazardous waste in appropriate circumstances; 2) apply no less strict controls to non-member countries than they would to member countries; 3) prohibit movements of hazardous waste to a non-member country without that country's consent and prior notification to any transit countries; and 4) prohibit movement of hazardous waste to a non-member country unless directed to an adequate disposal facility in that country.²³⁰ The OECD Export Decision provides that the recommended administrative measures for its implementation may apply in the absence of an international agreement between exporting and importing countries, or they may serve as the basis for negotiating such an agreement.²³¹

A few months after the OECD Export Decision, the United States signed the treaties regarding the export of hazardous waste with Mexico and Canada. However, it is unclear what effect the OECD Export Decision had on those two treaties.²³² For example, those treaties, unlike the OECD Export Decision, do not address the issue of receiving facility standards.²³³

B. THE UNITED NATIONS INTERNATIONAL TREATY

1. The Peaty Negotiations

The push for international action to control the export of hazardous waste has continued unabated. Not only does the export of hazardous waste have the potential for causing global environmental problems, but because it occurs across borders the problem cannot be solved by any one country.²³⁴ Pressure for an international agreement to control the export of hazardous waste increased greatly after the **Koko** incident, where an Italian company shipped leaking drums of hazardous waste to Nigeria, and numerous other incidents where dishonest European waste-disposal companies bribed African

²²⁹*Id.* at 1013.

²³⁰*Id.* art. 1, at 1011.

²³¹*Id.* art. 1, at 1011.

²³²Helfenstein, *supra* note 2, at 786.

²³³*Id.* at 789.

²³⁴*Id.* at 788.

officials to allow dumping of hazardous waste at unsafe sites.²³⁵ Calls for an international treaty were prompted primarily by leaders of developing countries, because of concern that their countries were becoming dumping grounds for the industrialized world²³⁶ and because their countries lack the requisite expertise or political will to handle such shipments safely.²³⁷

In June 1987, when the United Nations Environmental Program (UNEP) Governing Council approved the Cairo Guidelines, it simultaneously authorized the Executive Director of UNEP to convene a working group of legal and technical experts with a mandate to prepare a global treaty regarding the export of hazardous waste, utilizing the Cairo Guidelines and the relevant work of national, regional, and international bodies. In October 1987 the Executive Director convened an organizational meeting of the Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of Transboundary Movements of Hazardous Wastes. The Working Group also held sessions in February 1988, June 1988, November 1988, and January-February 1989.²³⁸ By the November 1988 meeting, the Executive Director received numerous responses from governments and consulted with several governmental experts in their personal capacities. He also met with representatives of pre-shipment inspection companies, some major industries, and several non-governmental organizations. He noted several outstanding issues: 1) the types of wastes to be covered; 2) issues of state responsibility, liability, and sanctions for noncompliance; 3) assistance to developing countries in checking notification and transit; 4) a means of ensuring environmentally sound receiving facilities; 5) action during emergencies; 6) illegal traffic in hazardous wastes; 7) offshore territories and ships with flags of convenience; 8) criteria for allowing export of hazardous waste and permitting waste sites and facilities; 9) financial arrangements for implementing the treaty; and 10) developing the required infrastructure, particularly among developing countries.²³⁹

The Executive Director urged the Working Group to have the treaty ready for signature in March 1989. He stressed the purposes of the treaty as: 1) to greatly decrease the generation of hazardous waste and thus eliminate the need for its shipment; 2) to minimize the ex-

²³⁵Greenhouse, *supra* note 14, at 1, col. 2.

²³⁶Aepfel, *supra* note 22, at 1, col. 3.

²³⁷Cody, *supra* note 30, at A-32, col. 5.

²³⁸Draft, *supra* note 41, at 1.

²³⁹Report, *supra* note 44, at 3.

port of hazardous waste and allow it only when it is equally or more environmentally sound to dispose of it by export; and 3) to ensure that any export of hazardous waste is done under the most environmentally safe conditions available.²⁴⁰

The international treaty regarding the export of hazardous waste resulted from eighteen months of negotiations.²⁴¹ During the negotiations, the main division was between industrialized and developing countries.²⁴² The final treaty represented a compromise between major industrial nations seeking to maintain flexibility for safe waste exports and third world governments who wanted an outright ban on the export of hazardous waste endangering their populations.²⁴³

During the treaty negotiations, Greenpeace and the West African countries began by demanding a total ban on export of hazardous waste. This was opposed, however, by such people as Dr. Mostafa Talba, the Executive Director of UNEP, on the ground that several developing countries generate waste but have no experience or equipment to deal with it.²⁴⁴ For example, it might make sense for a crowded tropical country to send hazardous waste to a less populated and drier country, where there would be a smaller chance of dangerous materials leaching into the soil.²⁴⁵ Although an outright export ban was dropped from the treaty, the United States, attempting to keep the focus on national rather than international legislation, proposed in March 1989 to ban the export of hazardous waste to any country not having a bilateral agreement with the exporter.²⁴⁶

Another demand by developing countries was that the exporter be allowed to ship hazardous waste only to countries with environmental regulations equal to those of the exporting country. This demand was abandoned, however, mainly because of opposition by the United States, which argued that this provision would effectively ban the export of hazardous waste, including such exports to Canada.²⁴⁷

Another dispute over whether to include radioactive waste within the treaty was resolved, in part because of American pressure, by

²⁴⁰*Id.* at 2.

²⁴¹*Treaty Reached for Control of Toxic Waste*, Washington Post, Mar. 22, 1989, at A-23, col. 3.

²⁴²Aepfel, *supra* note 5, at 2, col. 5; Greenhouse, *supra* note 14, at 1, col. 2.

²⁴³Cody, *supra* note 30, at A-1.

²⁴⁴*Waste-Watching*, *supra* note 9, at 44, col. 1.

²⁴⁵Aepfel, *supra* note 5, at 2, col. 4.

²⁴⁶*Id.* at col. 5.

²⁴⁷*Id.*

agreeing to cover the issue under the International Atomic Energy Agency.²⁴⁸ Because of third-world insistence, however, a provision allowing them to disapprove import or transshipment of hazardous waste through their territories was included in the treaty.²⁴⁹

2. *The Treaty*

The Basic Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal²⁵⁰ (the UN Treaty) enters into force ninety days after ratification by twenty countries.²⁵¹ It does not allow any reservations or exceptions.²⁵² Amendments require a two-thirds majority.²⁵³ The parties may not withdraw until after three years, and a one year's withdrawal notice is required.²⁵⁴

Under the UN Treaty, hazardous wastes are considered to be wastes that belong to any category in Annex I, unless they have none of the characteristics in Annex III; and they also include anything considered to be hazardous waste by the country of export, import, or transit.²⁵⁵ However, hazardous waste does not include radioactive wastes²⁵⁶ or normal ship discharge.²⁵⁷ The parties have six months to submit lists of hazardous waste, which must then be updated.²⁵⁸

Under the UN Treaty, the parties must take appropriate measures to minimize the generation of hazardous waste, taking into account social, technological, and economic aspects.²⁵⁹ In addition, the parties are obligated to ensure that export of hazardous and other waste is reduced to a minimum, consistent with environmentally sound and efficient management of such wastes, and to do so in a manner that protects human health and the environment.²⁶⁰

There are several outright prohibitions on the export of hazardous waste. First, the parties may not allow export to destinations south of sixty degrees south latitude.²⁶¹ Second, the parties may not allow

²⁴⁸Greenhouse, *supra* note 14, at B-11, col. 2.

²⁴⁹*Western*, *supra* note 12, at 49.

²⁵⁰U.N. Doc. No. UNEP/IG.80/3, Mar. 22, 1989.

²⁵¹*Id.* art. 25.

²⁵²*Id.* art. 26.

²⁵³*Id.* art. 17.

²⁵⁴*Id.* art. 27.

²⁵⁵*Id.* art. 1(1).

²⁵⁶*Id.* art. 1(3).

²⁵⁷*Id.* art. 1(4).

²⁵⁸*Id.* art. 3.

²⁵⁹*Id.* art. 4(2)(a).

²⁶⁰*Id.* art. 4(2)(d).

²⁶¹*Id.* art. 4(6).

the export to a non-party.²⁶² Third, parties may not allow export to countries that prohibit the import of hazardous waste.²⁶³ Parties may themselves prohibit the import of hazardous waste.²⁶⁴ Finally, the parties may not allow export to a state if they believe the state will not manage the waste in an environmentally sound manner, according to criteria to be subsequently developed.²⁶⁵

The parties may allow the export of hazardous waste only if: 1) the exporting country does not have the technical capacity or necessary facilities to dispose of it in an environmentally sound and efficient manner; 2) wastes are required for recycling; or 3) the shipment meets other criteria to be decided by the parties within the objectives of the UN Treaty.²⁶⁶

Prior notification to and consent by the importing country are required before shipment.²⁶⁷ The notification must clearly state the effects of the proposed export of hazardous waste on human health and the environment. The waste may not be exported unless the importing country consents in writing.²⁶⁸ In addition, prior notification and consent are required for transit states.²⁶⁹ The purposes of these provisions are to halt unwanted shipments and to prevent the export of hazardous waste to unsafe sites.²⁷⁰

Exported hazardous waste must meet international packaging, labeling, and transport requirements.²⁷¹ A manifest must also be used,²⁷² and the parties must ensure that transporters and disposers are permitted.²⁷³ The parties must also require exported hazardous waste to be managed in an environmentally safe manner.²⁷⁴

If a party has consent but cannot complete the export of hazardous waste in accordance with the contract, it must reimport the waste.²⁷⁵ The parties must also reimport illegally shipped hazardous waste.²⁷⁶

²⁶²*Id.* art. 4(5).

²⁶³*Id.* art. 4(2)(e).

²⁶⁴*Id.* art. 4(1)(a).

²⁶⁵*Id.* art. 4(2)(e).

²⁶⁶*Id.* art. 4(9).

²⁶⁷*Id.* art. 6.

²⁶⁸*Id.* art. 4(1)(c).

²⁶⁹*Id.* art. 7.

²⁷⁰Cody, *supra* note 30, at A-1, col. 5; Greenhouse, *supra* note 14, at 1, col. 1.

²⁷¹UN Treaty, *supra* note 250, art. 4(7)(b).

²⁷²*Id.* art. 4(7)(c).

²⁷³*Id.* art. 4(7)(a).

²⁷⁴*Id.* art. 4(8).

²⁷⁵*Id.* art. 8.

²⁷⁶*Id.* art. 9.

The parties may impose additional consistent requirements to protect human health and the environment.²⁷⁷ They may also make bilateral agreements outside the treaty for the export of hazardous waste, as long as these arrangements are not less environmentally sound than those provided by the treaty, taking into account the interests of developing countries.²⁷⁸ The United States, because of its bilateral agreements with Mexico and Canada, was strongly in favor of this provision.²⁷⁹

Finally, the UN Treaty establishes a conference for subsequent meetings.²⁸⁰

3. *Reaction to the UN Treaty*

At the final treaty session in March 1989, 117 countries, including the United States, sent representatives to the three-day UN-sponsored conference.²⁸¹ On March 22, 1989, 105 nations signed the treaty.²⁸² By signing the treaty, they signalled their countries' intentions of adopting the UN Treaty.²⁸³ In addition, thirty-four countries immediately adopted the treaty itself.²⁸⁴ Many more countries are expected to do so in coming months,²⁸⁵ and UNEP officials hope that ratification will occur by mid-1990.²⁸⁶

Most nations, including the United States, did not sign the treaty immediately because of a need to study it further or to allow for review by environmental officials in their countries.²⁸⁷ None of the thirty-nine African countries represented signed the UN Treaty.²⁸⁸ Many OAU nations still want an outright ban on the export of hazardous waste to Africa,²⁸⁹ and thus it is unclear whether they will ratify the UN Treaty.²⁹⁰ Several African and South American countries intend to make regional agreements with stricter provisions than those contained in the international treaty.²⁹¹ Andrew Sens, director of the

²⁷⁷*Id.* art. 4(11).

²⁷⁸*Id.* art. 11.

²⁷⁹Cody, *supra* note 30, at A-32, col. 6.

²⁸⁰UN Treaty, *supra* note 250, art. 15.

²⁸¹Greenhouse, *supra* note 14, at 1, col. 1.

²⁸²*Id.*; Cody, *supra* note 30, at A-1, A-32, col. 5.

²⁸³Greenhouse, *supra* note 14, at 1, col. 2.

²⁸⁴Aepfel, *supra* note 5, at 2, col. 3; Cody, *supra* note 30, at A-32, col. 5.

²⁸⁵Aepfel, *supra* note 5, at 2, col. 3.

²⁸⁶Greenhouse, *supra* note 14, at 1, col. 2.

²⁸⁷*Id.*

²⁸⁸*Id.* at B-11, col. 3.

²⁸⁹Moghalu, *supra* note 24, at col. 1.

²⁹⁰Aepfel, *supra* note 22, at 2, col. 3.

²⁹¹*Id.*

U.S. State Department's office of environmental protection, said that before the United States decides to sign, the treaty must go through inter-agency review. He stated that this does not mean that the United States disagrees with the treaty. He said that the UN Treaty has many useful features to protect human health and the environment, particularly the requirement for prior notification to and consent by the country of import.²⁹² William Reilly, Administrator of the EPA, sent a statement to the UN Treaty conference that President Bush intends in any case to push for new United States laws barring the export of hazardous waste except where there is an agreement with the receiving country providing for safe handling and management of the waste.²⁹³

Some groups severely criticized the UN Treaty. Greenpeace stated that the UN Treaty is so vague that it is worse than no treaty at all,²⁹⁴ and that it provides a legal framework to continue the hazardous waste trade without doing anything to reduce it.²⁹⁵ Greenpeace suggested that the appropriate solution is an outright ban on the export of hazardous waste.²⁹⁶ The Natural Resources Defense Council was also unhappy that the treaty was not more stringent.²⁹⁷

Many developing countries also criticized the UN Treaty as not going far enough in controlling the export of hazardous waste.²⁹⁸ In particular, several countries were unhappy that the export of hazardous waste was not totally banned.²⁹⁹ However, Dr. Mostafa Talba, Executive Director of UNEP, said it was never the UN's intention to push for a total ban, because in the future developing countries may for good environmental reasons need to export hazardous wastes.³⁰⁰ Sierra Leone's environmental minister complained that the UN Treaty had been watered down in deleting, under United States and West German pressure, a provision prohibiting export of hazardous waste to countries with less strict waste-disposal policies.³⁰¹

Several African officials were also concerned that the industrialized countries will not do enough to apply the UN Treaty, because it gives

²⁹²Greenhouse, *supra* note 14, at B-11, col. 1; Cody, *supra* note 30, at A-32, col. 4.

²⁹³Cody, *supra* note 30, at A-32, col. 4.

²⁹⁴Greenhouse, *supra* note 14, at B-11, col. 3.

²⁹⁵Aepfel, *supra* note 5, at 2, col. 4.

²⁹⁶Cody, *supra* note 30, at A-32, col. 4.

²⁹⁷Greenhouse, *supra* note 14, at B-11, col. 3.

²⁹⁸*Id.* at 1, col. 2.

²⁹⁹Aepfel, *supra* note 5, at col. 3.

³⁰⁰*Id.* at col. 4.

³⁰¹Greenhouse, *supra* note 14, at B-11, col. 3.

the importing countries little enforcement mechanisms.³⁰² The French environmental minister agreed that although the treaty contains many strong statements, its importance will lie in how it is applied.³⁰³

On balance, however, most participants view the UN Treaty as an important step forward, and many supporters consider it an important point of departure. They view it as the first serious effort to regulate the export of hazardous waste, one that will be built upon by other conferences.³⁰⁴ The first follow-up meeting to the UN Treaty is scheduled for three months after ratification, to set technical guidelines for the environmentally sound management of hazardous wastes. Dr. Talba summed up the effect of the UN Treaty as follows: "Our agreement has not halted the commerce in poison. But it has signaled the international resolve to eliminate the menace that hazardous wastes pose to the welfare of our shared environment and to the health of all the world's peoples."³⁰⁵

VI. CONCLUSION

The shocking situations resulting from the export of hazardous waste have led to increasing domestic and international attempts to control the problem. As shown by the UN Treaty, the world is coming to realize that this is a global problem, requiring concerted action at the international level. However, there remain strong differences of opinion between developing and industrialized countries, and the world is far from unified on a common solution to the problem.

If the UN Treaty is ratified, RCRA will need to be significantly modified to reflect the additional restrictions on the export of hazardous waste included in the treaty. However, both the UN Treaty and RCRA presently provide for exceptions to their requirements where there is a bilateral agreement in effect. Based on both United States congressional and executive statements, it appears that the United States may enact legislation to prohibit the export of hazardous waste except where there is such an agreement. This will effectively relegate the issue to bilateral negotiations, rather than the multilateral arena. Such legislation would be positive both from economic and political standpoints. However, it remains to be seen whether it would

³⁰²*Id.*

³⁰³*Id.* at B-11, col. 2.

³⁰⁴*Id.* at 1, col. 2; B-11, col. 3.

³⁰⁵Cody, *supra* note 30, at A-32, col. 4; Greenhouse, *supra* note 14, at B-11, col. 1.

be beneficial environmentally, as much depends on both the environmental protections incorporated into the bilateral agreements and the zeal with which the appropriate governments and agencies, including **EPA**, enforce such legislation.

In conclusion, the UN Treaty shows a positive trend in the development of protections against the unsafe export of hazardous waste. Observers hope that the United States and the entire world will vigorously enforce these protections, so that modern Western pirates illegally transporting hazardous waste, such as in the *Khian Sea* incident, will go the way of their 18th and 19th century predecessors.

THE WAGES OF FEDERAL EMPLOYEES: CAN WE TALK?

by Captain Natalie L. Griffin*

I. INTRODUCTION

As long as management and labor sit across a table from each other they will disagree. The problem becomes even more complex not only when they disagree over the topic of discussion, but also when they disagree over whether to discuss the topic at all. The salaries of federal employees have long been such a topic. This paper will review the question whether union proposals concerning the compensation of federal employees are permissible topics for discussion.

Recent cases are divided in their holdings and yet uniform in the questions they have examined! The issues are clearly threefold. The first issue is whether compensation of federal employees whose rates of compensation are not specifically set by statute is a negotiable "condition of employment."² The second is whether bargaining proposals that involve compensation of employees are non-negotiable because they interfere with the agency's management right to determine its budget.³ The third issue is whether the duty to bargain over wages is inconsistent with federal law or government-wide rules or regulations, or alternately with agency rules or regulations for which a compelling need exists.⁴

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¹Fort Knox Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989), *cert. granted and judgment vacated*, (June 4, 1990) (No. 89-736); Department of Defense Dependents Schools v. FLRA, 863 E.2d 988 (D.C. Cir. 1988), *reh'g en banc granted*, Feb. 6, 1989; Fort Stewart Schools v. FLRA, 860 F.2d 396 (11th Cir. 1989), *aff'd*, 58 U.S.L.W. 4624 (1990); Nuclear Regulatory Commission v. FLRA, 859 F.2d 302 (4th Cir. 1988), *cert. granted and judgment vacated*, (June 4, 1990) (No. 89-198), *reh'g granted*, 879 F.2d 1225 (4th Cir. 1989), *cert. granted and judgment vacated*, (June 4, 1990) (No. 89-562); West Point Elementary School Teachers Assoc. v. FLRA, 855 F.2d 936 (2d Cir. 1988); U.S. Dept. of Defense Dependent Schools v. FLRA, 838 F.2d 129 (4th Cir. 1988); Dept. of the Treasury v. FLRA, 838 F.2d 1341 (D.C. Cir. 1988); Navy Military Sealift Command v. FLRA, 836 F.2d 1409 (3d Cir. 1988); AFGE and AF, 24 F.L.R.A. 377 (1986).

²5 U.S.C. § 7103(a)(14) (1988).

³5 U.S.C. § 7106(a) (1988).

⁴5 U.S.C. § 7117 (1988).

It is the position of various federal agencies that these types of proposals are not negotiable.⁵ The Federal Labor Relations Authority (FLRA) insists that they are indeed negotiable. Federal circuits that have considered the question are equally divided in their responses. Most recently the question was addressed to the United States Supreme Court in *Fort Stewart Schools v. FLRA*.⁶ The Supreme Court decided this case on May 29, 1990. This article will review the historical context giving rise to the controversy over these labor disputes, including this most recent decision that resolved some of the issues.

A. COLLECTIVE BARGAINING IN THE FEDERAL SECTOR

To understand the positions of the various players, the authority under which they operate and their roles in the process must be analyzed. There is one underlying theme to this collective bargaining process that cannot be disputed—collective bargaining is favored. In 1978 the Federal Service Labor-Management Relations Statute was enacted as Title VII of the Civil Service Reform Act.⁷ Congress was unequivocal in its statement of purpose, stating:

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment *Therefore, labor organizations and collective bargaining in the civil service are in the public interest.*⁸

Government agencies are tasked to engage in collective bargaining with their employees through the employees' exclusive represen-

⁵See cases cited *supra* note 1.

⁶*Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1989), *aff'd*, 58 U.S.L.W.4624 (1990).

⁷5 U.S.C. § 701 (1988).

⁸5 U.S.C. § 7101 (1988) (emphasis added).

tative.⁹ This duty to bargain is a duty to “bargain in a good-faith effort to reach agreement with respect to the conditions of employment.”¹⁰ Case law is replete with examples of “conditions of employment” that are proper subjects for negotiation.¹¹ There is still much room for argument, as evident from this article’s discussion, over what the term “conditions of employment” means. The statute defines conditions of employment as

personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position, or

(C) to the extent such matters are specifically provided for by Federal statute.¹²

Collective bargaining is in the public interest, and government agencies must bargain in good faith over “conditions of employment.” Congress, however, recognizing the need for the Federal Government to function efficiently and effectively, placed limitations on the duty to bargain. The obligation to bargain in the federal sector is not as comprehensive as it is in the private sector. There is no duty to bargain over matters that conflict with federal law or a government-wide rule or regulation, or with an agency rule or regulation for

⁹5 U.S.C. § 7103(a)(12) (1988) states:

“[C]ollective bargaining” means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

¹⁰*Id.*

¹¹American Fed’n of Gov’t Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 F.L.R.A. 604 (1980).

¹²5 U.S.C. § 7103 (a)(14) (1988).

which a compelling need exists.¹³ There is also no duty to bargain over those areas known as management rights. These include, among other things, the agency's authority to "determine the mission, budget, organization, number of employees, and internal security practices of the agency."¹⁴

B. THE ROLE OF THE FEDERAL LABOR RELATIONS AUTHORITY

Agencies must engage in good-faith bargaining with their employees over matters that are proper "conditions of employment." However, agencies and their employees are not always in agreement concerning where the line of negotiability is drawn. Is it a "condition of employment"? Is it a management right? The role of the FLRA, a three-member, independent, bipartisan body appointed by the President, is to "resolve issues relating to the duty to bargain in good faith."¹⁵

¹³⁵ U.S.C. § 7117 (1988) states:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by an agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

Id. See *FLRA v. Aberdeen Proving Ground*, Dept. of the Army, 108 S.Ct. 1261 (1988).

¹⁴⁵ U.S.C. § 7106 (1988).

¹⁵⁵ U.S.C. § 7105(a)(2)(E) (1988). The FLRA is created under 5 U.S.C. § 7104 and is empowered to "conduct investigations and to provide for hearings" under 5 U.S.C. § 7105(e)(1)(B). The FLRA will appoint Regional Directors and Administrative Law Judges for the proper performance of these functions, 5 U.S.C. § 7105(d) (1988).

A federal agency may refuse to bargain altogether by alleging that the duty to bargain does not extend to a particular matter. In that case the exclusive representative of the employees may appeal the agency's allegation of non-negotiability to the FLRA.¹⁶ The final decision of the FLRA is appealable to the courts of appeals.¹⁷ The role of the FLRA is analogous to the National Labor Relations Board (NLRB) in the private sector. The FLRA, like the NLRB, was to "develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Federal Service Labor-Management Relations Statute."¹⁸

The parties may initially agree to bargain, but they may not be able to reach agreement. The parties have an obligation to bargain until they reach an impasse. When such an impasse is reached, it may be resolved by either party requesting the Federal Service Impasse Panel to consider the matter, or the parties may agree to adopt binding arbitration of the negotiation impasse if approved by the Panel.¹⁹ Quite simply, the FLRA is the umpire between agencies and unions, ensuring that both sides are carrying out their obligations under the federal labor relations program.

II. THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS)-CONGRESSIONAL INTENT

A. *LEGISLATIVE HISTORY*

The guiding principles of collective bargaining in the federal sector can be found in the FSLMRS. An examination of the statute and its legislative history should clarify whether Congress intended wages to be a matter for collective bargaining. The intent of Congress, however, is far from clear. Consequently, federal courts examining the question are equally divided. There are two issues to examine in reviewing the intent of Congress. One is the general intent that is evident from the rhetoric during the floor debates prior to passage of the statute. The other is the more specific intent that requires an examination of the language of the statute and the history of that language.

¹⁶5 U.S.C. § 7117(c)(1) (1988).

¹⁷5 U.S.C. § 7123 (1988).

¹⁸*Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

¹⁹5 U.S.C. § 7119(b) (1988).

There are many statements that seem to indicate congressional disfavor with the proposition that wages are negotiable in the federal sector. Congressman Udall, the proponent of the compromise bill that eventually became the FSLMRS, stated:

There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement—the kinds of things that are giving us difficulty in the Postal Service today. All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action.²⁰

Congressman Ford also stated, “[N]o matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement.”²¹ The House Report that accompanied the bill stated that “employees, through their unions, [will] be permitted to bargain with agency management throughout the executive branch on most issues, except that federal pay will continue to be set in accordance with the pay provisions of title 5.”²²

²⁰124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978)(remarks of Rep. Udall), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 923 (1979) [hereinafter *Legislative History*].

²¹124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978)(remarks of Rep. Ford); *Legislative History*, *supra* note 20, at 855-56.

²²H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978); *Legislative History*, *supra* note 20, at 682. In the supplemental views accompanying the House Report, a committee member stated:

Those of our colleagues who are concerned that this bill will significantly expand the collective bargaining rights of federal employees need not worry. It does not. Enactment of the committee approved labor-management title will continue to deny to Federal employees most of the collective bargaining rights which their counterparts in the private sector have enjoyed for over 40 years. Among the collective bargaining rights not included in this bill [is] . . . [t]he right to bargain collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance

Supplemental Views to H.R. 11280; *Legislative History*, *supra* note 20, at 721.

The Senate Report accompanying S.2640 states:

S.2640 incorporates into law the existing federal employees relations program. At the same time, S.2640 recognizes the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business. It insures to federal agencies the right to manage government operations efficiently and effectively The bill permits unions to bargain collectively on personnel policies and practices, and other matters affecting working conditions within the authority of agency managers It excludes bargaining on economic matters

S. Rep. No. 95-969, 95th Cong., 2d Sess. 12-13(1978), 1978 U.S. Code Cong. & Admin. News 2723, 2734-35; *Legislative History*, *supra* note 20, at 839.

While the above statements seem to indicate a blanket disapproval of wages as a negotiable matter, there were other views expressed. Congressman Clay, who supported Representative Udall's compromise legislation, stated:

Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the *clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection*. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.²³

The differing statements begin to devolve into two different analyses. If only the sentiments of Congressmen Udall, Ford, and a few others are considered, absent the statutory language and its prior history, then the proposition is easily supported that wages are not negotiable. It is a one-part analysis—a theory that stands alone. If, however, the statements of all the Congressmen, specifically Congressman Clay, are considered along with the statutory language and the history of the negotiability of wages prior to 1978, then a two-part analysis begins to emerge. Wages are not per se nonnegotiable; they are nonnegotiable only if "specifically provided for by Federal statute."

This distinction is evident from the analysis of the courts that have considered the question. The Third Circuit considered the legislative history to be "replete . . . with indications that Congress did not intend to subject pay of federal employees to bargaining."²⁴ The Eleventh Circuit, however, stated that "although some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRS would not supplant specific laws which set wages and benefits."²⁵

The Supreme Court in *Fort Stewart Schools v. FLRA* noted that the petitioner had

²³124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978)(remarks of Rep. Clay); Legislative History, *supra* note 20, at 933 (emphasis added).

²⁴Dept. of Navy, Military Sealift Com. v. FLRA, 836 F.2d 1409, 1417 (3rd Cir. 1988).

²⁵Fort Stewart Schools v. FLRA, 860 F.2d 396, 402 (11th Cir. 1988).

culled a formidable number of statements suggesting that certain members and committees of Congress did not think the duty to bargain would extend to proposals relating to wages and fringe benefits The trouble with these statements, to the extent they are relevant to our inquiry, is that they may have been wrong The legislative materials to which petitioner refers display no awareness [that some federal employees are exempted from the General Schedules]. To the contrary, numerous statements, many from the same sources to which petitioner points, display the erroneous belief that the wages and fringe benefits of *all* Executive Branch employees were set by statute.²⁶

B. FEDERAL EMPLOYEES AND THE POTENTIAL FOR WAGE NEGOTIATIONS

The application of the two-part analysis is accepted for the great majority of employees in the federal workplace. There is no duty to bargain over "conditions of employment" that are "specifically provided for by Federal statute." The wages and benefits of the majority of federal employees are set by federal statutes providing for pay and benefits, i.e., the General Schedule, which establishes pay rates.²⁷ There is no argument, and all parties in the recent case before the Supreme Court conceded, that approximately ninety-seven percent of the federal workers have their salaries set by law.²⁸ Therefore, ninety-seven percent of the federal workforce may not negotiate over wages.

Proponents of the theory that wages are not negotiable read the all-encompassing statements of some legislators to apply to all federal employees. Those who support the negotiability of wages assert that the statements are overly broad because legislators were referring to such a large majority of federal employees (ninety-seven percent). It was difficult not to overstate the obvious. As the Eleventh Circuit reasoned, these statements were mere assurances to other Congressmen that the FSLMRS did not intend to supplant specific laws that provided for the wages and benefits of the great majority of federal employees.²⁹ The two-part test is fulfilled by so many federal employees that there is a tendency to forget that there are two parts.

²⁶Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624, 4626 (1990)

²⁷5 U.S.C. § 5331-5332 (1988).

²⁸28 Gov't Emp. Rel. Rep. (BNA) 59 (Jan. 15, 1990).

²⁹Fort Stewart, 860 F.2d at 402.

In other words, the proposition that wages are nonnegotiable because they are predominantly set by federal statute becomes the singular principle that wages of federal employees are nonnegotiable.

The Supreme Court in the *Fort Stewart* case referred to those employees whose wages are not covered by the General Schedules as a “miniscule [sic] minority.” The Court noted that the statements of legislators who were unaware of the existence of these employees and believed all wages of federal employees were set by statute

may have rested on the following syllogism: The wages and fringe benefits of all federal employees are specifically provided for by federal statute; “conditions of employment” subject to the duty to bargain do not include “matters . . . specifically provided for by Federal statute”; therefore “conditions of employment” subject to the duty to bargain do not include the wages and fringe benefits of all federal employees. Since the premise of that syllogism is wrong, so may be its expressed conclusion. There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speaker’s incomplete understanding of the world upon which the statute will operate.³⁰

C. LEGISLATIVE AUTHORIZATION

Did Congress consider the question whether wages should be negotiable? Yes, and on two separate occasions it replied in the negative. Congressman Ford introduced a bill that would make pay a negotiable item for federal employees, but it was not passed.³¹ Representative Heftel later introduced a proposal that would have allowed negotiation over “pay practices” and “overtime practices . . . consonant with law and regulation.”³² These unsuccessful attempts to extend bargaining are viewed with particular significance because “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”³³ Again, supporters of the negotiability of wages for certain federal employees do not find this argument to be persuasive. They claim that rejection of these proposals does not signify

³⁰*Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624, 4626 (1990).

³¹124 Cong. Rec. 25,721 (1978)

³²Legislative History, *supra* note 20, at 1087-88 (proposing a new § 7115(b)).

³³*INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted); Petitioners’ Brief at 21, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65).

congressional intent to make all pay matters per se nonnegotiable. The fact that Congress did not want to extend the ability to negotiate over wages to the entire federal workforce does not foreclose that possibility for a minority. Indeed, there were many other matters listed in the rejected proposals, such as promotion procedures and safety matters, that clearly are negotiable today. Therefore, rejection of these proposals could not have rendered all matters contained therein nonnegotiable.³⁴

Did Congress intend to sweepingly restrict from negotiability the issue of pay and benefits for all federal employees and not just the ninety-seven percent who are excluded by virtue of conflicting federal statutes? Congressman Clay stated that "employees still . . . cannot bargain over pay."³⁵ Congressman Devinski stated that wages and fringe benefits remained beyond the scope of collective bargaining.³⁶ The Eleventh Circuit read such statements as a demonstration that Congress intended to continue existing practice regarding the negotiation of wages.³⁷ As the Supreme Court explained, however, these legislators were incorrect.³⁸ It is therefore not necessary to attempt to rationalize their statements. Can these statements even be reconciled with the then-existing practice? Were no federal employees allowed to negotiate over wages and benefits? The fact is that prior to adoption of the FSLMRS there were federal employees who were allowed to bargain over their wages.

III. HISTORY OF BARGAINING OVER WAGES IN THE FEDERAL WORKPLACE PRIOR TO THE CIVIL SERVICE REFORM ACT OF 1978

A. ESTABLISHMENT OF A GOVERNMENT- WIDE LABOR RELATIONS PROGRAM

As far back as 1949 federal employees were allowed to bargain over their wages. Congress at that time exempted skilled craft workers

³⁴Respondent's Brief (FLRA) at 28, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 1624 (1990) (No. 89-65).

³⁵124 Cong. Rec. E4293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay); Legislative History, *supra* note 20, at 839.

³⁶124 Cong. Rec. H9639 (daily ed. Sept. 13, 1978) (remarks of Rep. Devinski); Legislative History, *supra* note 20, at 935.

³⁷*Fort Stewart Schools v. FLRA*, 860 F.2d at 402.

³⁸*See supra* text accompanying note 26.

and semiskilled manual laborers from the Classification Act, which then set federal employees' pay.³⁹ Additionally, the Bureau of Reclamation in the Department of Interior has voluntarily bargained with employees over wages since the late 1940's.⁴⁰

In 1961 President Kennedy established a special Task Force on Employee-Management Relations in the Federal Service and gave the members, as their assignment, the formulation of government-wide policy on labor-management relations. The Task Force noted that the more similar a government activity was to a private activity that was unionized, the more often the government activity would be similarly organized. Additionally, the relationships between management officials and workers in those activities would mirror the relations in private industry. Thus, they found that "in the Tennessee Valley Authority and various units of the Department of Interior, relationships that [were] close to full scale collective bargaining between trade unions and management officials [had] been going on for years, to the complete satisfaction of all the parties concerned."⁴¹

The Task Force examined the scope of consultations and negotiations with employee organizations. They noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits. These are established by law."⁴² They then recommended:

Specific areas that might be included among *subjects for consultation and collective negotiations include* the work environment, supervisor-employee relations, work shifts and tours of duty, grievance procedures, career development policies, and *where permitted by law the implementation of policies relative to rates of pay* and job classification. This list is not, of course, all-inclusive, nor should it be expected that every agency will feel free to negotiate in all such areas.⁴³

In a statement accompanying the Task Force recommendations, President Kennedy directed that an Executive order be prepared to give effect to their recommendations. He stated: "[W]here salaries

³⁹Act of Oct. 28, 1949, ch. 782, § 201, Pub. L. No. 81-429, § 201, 63 Stat. 954.

⁴⁰U.S. Dept. of Energy, Western Area Power Administration, Golden, Colorado and IBEW Locals 640, et al., 22 F.L.R.A. 758, 802-03 (1896).

⁴¹President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service (1961), reprinted in Legislative History, *supra* note 20, at 1177, 1187.

⁴²*Id.* at 1200.

⁴³*Id.* at 1201 (emphasis added).

and other conditions of employment are fixed by Congress[,] these matters are not subject to negotiation.”⁴⁴ The two-part analysis is evident in the Task Force’s recommendations and President Kennedy’s endorsement of them. Thus, those who support the negotiability of wages point to the prior history of the government-wide labor relations program. They submit that those who developed the program intended wages to be negotiable “conditions of employment” unless otherwise set by Congress.⁴⁵

B. EXECUTIVE ORDERS AND THE FEDERAL LABOR RELATIONS COUNCIL

The conduct of labor relations in the federal sector from 1962 to 1978 was guided by principles established by a succession of Executive orders.⁴⁶ Also established by one of those Executive orders (No. 11,491) was the Federal Labor Relations Council (FLRC). It was the predecessor of the Federal Labor Relations Authority (FLRA), as it also had the authority to resolve disputes concerning the negotiability of collective bargaining proposals.⁴⁷

The FLRC considered the issue of negotiability of wages in two cases. In one case the FLRC held that teachers at the Merchant Marine Academy could bargain over their wages because they were exempt from the Classification Act, which set federal wages at the time, and their proposals did not conflict with federal law giving discretion to the Secretary of Commerce to set their salaries.⁴⁸ In the other case the FLRC held that pay proposals involving procedures and formulas for setting teacher compensation were negotiable because they did not conflict with the Overseas Teachers Pay and Personnel Practices Act.⁴⁹

The history of bargaining over wages under Executive Order 11,491 is undisputable. This past practice was recognized and intended to be continued after 1978. Representative Derwinski indicated that Title VII was to codify existing practices developed under the Executive orders when he stated,

⁴⁴*Id.* at 1178.

⁴⁵Respondent’s Brief (Fort Stewart Association of Educators) at 13, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁴⁶Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), *reprinted in* 1962 U.S. Code Cong. & Ad. News 4269, 4271; Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969).

⁴⁷Executive Order 11,491, § 4.

⁴⁸*United Fed’n of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972).

⁴⁹*Overseas Educ. Assoc., Inc. and Dept. of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978).

[T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now with their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.

The substance of this amendment closely resembles the original program established by President Kennedy.⁵⁰

The Senate Report stated, "The scope of negotiations under this section is the same as under section 11(a) of Executive Order 11,491."⁵¹ The enactment of the FSLMRS "constitute[d] a strong congressional endorsement of the policy on which the Federal labor relations program had been based since its creation in 1962."⁵² In light of such statements by Representative Clay that "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [FLRC]," it does not follow that Congress intended to restrict the scope of collective bargaining that existed under the Executive orders.⁵³ Rather, it appears that Congress intended to extend the scope of this bargaining.

Proponents of the non-negotiability of wages assert that because the FLRC decisions were not mentioned in the legislative history, Congress was unaware of them.⁵⁴ To the contrary, Congress is generally presumed to know the law as it pertains to legislation it enacts.⁵⁵ If a new law is adopted that incorporates sections of a prior law, Congress is presumed to know the judicial and administrative interpretations of the incorporated law.⁵⁶ The Eleventh Circuit noted that prior to enactment of the FSLMRS.

⁵⁰124 Cong. Rec. 29,188 (1978).

⁵¹S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2826.

⁵²*Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 103 (1983).

⁵³124 Cong. Rec. 29,187 (1978). *See also* Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices."); 124 Cong. Rec. 25,777 (1978) (remarks of Rep. Ford that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order").

⁵⁴Petitioner's Brief at 25, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁵⁵*Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-20 (1983).

⁵⁶*Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

existing practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits Congress should have known of this practice because the FSLMRS specifically mandates that decisions under Executive Order 11491 continue in effect unless superceded; the FLRC administered the [two decisions allowing negotiations over wages] under this Executive Order. 5 U.S.C. 7135(b) (1980).⁵⁷

C. PREVAILING WAGE RATE EMPLOYEES

There were other federal employees allowed to bargain over their wages prior to enactment of the FSLMRS. These were employees who had historically negotiated over their wages under the prevailing rate system. Can one argue that the Congressmen were also unaware of these employees' ability to bargain? That is unlikely, because they specifically addressed the practices of these employees during debate on the FSLMRS. Representative Ford offered the amendment that was "intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees Certainly, we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees."⁵⁸

Congress was aware of the bargaining practices of these employees in 1972 when it enacted the prevailing rate system. They included

⁵⁷Fort Stewart Schools v. FLRA: 860 F.2d at 402.

⁵⁸124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford); Legislative History, *supra* note 20, at 857. Rep. Ford stated:

During committee markup, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. This includes certain trade and craft employees of the Department of Interior, and those trade and craft employees in units or portions of units, transferred, effective October 1, 1977, from the Department of the Interior to the Department of Energy. This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

Certainly, we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees. This provision of the bill would have the effect of overruling the two Comptroller General decisions, and would adopt his own suggestion for specific legislative authorization. The provision would specifically authorize the continuation of prior collective bargaining practices, and would allow these employees, whom Congress already sought to protect in the savings provision of 1972 wage board reform law, to continue to negotiate their term and conditions of employment in accordance with the prevailing practice principle. I do not intend to expand or contract the scope of bargaining that existed prior to the Comptroller General decisions.

a clause allowing those employees who had historically negotiated over matters regarding “wages, . . . terms and conditions of employment, and other employment matters” to continue to negotiate over those same matters.⁵⁹ The Civil Service Reform Act also incorporated a saving clause for prevailing rate employees, allowing those who had historically bargained over their wages and benefits to continue to do so.⁶⁰

The review of the legislative history of the FSLMRS and prior Executive orders does not support those all-encompassing statements of some legislators that “there is nothing in this bill which allows federal employees the right to . . . negotiate over pay and money-related fringe benefits.”⁶¹ There was specific legislation allowing wage negotiations by prevailing rate system employees. There was a mandate under the FSLMRS that decisions under Executive Order 11,491 continue in effect unless superceded. In addition, two FLRC decisions under that Executive Order allowed wage negotiations. In fact, during oral argument before the Supreme Court, the Acting Solicitor General, who had argued in his brief that Congress was unaware of those cases, made a concession to Justice Sandra Day O’Connor. He agreed that one of the FLRAs “strongest arguments” was that the FLRAs predecessor, the FLRC, had issued those two decisions upholding the obligation to bargain under that Executive Order over money items within an agency’s discretion.⁶²

⁵⁹Pub. L. No. 92-392, § 9(b), 86 Stat. 564 (1978), *reprinted in* 5 U.S.C. § 5343 note (1982). Section 9(b) provides:

The amendments make by this Act shall not be construed to--

(1)abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act [Aug. 19, 1972] pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees

⁶⁰Pub.L. No. 95-454, § 704, 92 Stat. 1218 (1978). Section 704 provides:

(a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom § 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of § 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated

⁶¹124 Cong. Rec. H466 (daily ed. Aug. 11, 1978) (remarks of Rep. Clay); Legislative History, *supra* note 20, at 853.

⁶²28 Gov’t Emp. Rel. Rep. (BNA) 59-60 (Jan. 15, 1990).

Thus, wages are a negotiable "condition of employment" if not "specifically provided for by Federal statute." The next obstacle to this analysis, however, is to determine whether wages are a "condition of employment."

IV. "CONDITIONS OF EMPLOYMENT"

A. *LEGISLATIVE HISTORY AND COMPARABLE STATUTES*

A review of congressional intent requires not only an examination of the general intent of Congress based on past practice and prior legislation, but also the specific language of the statute. The general duty to bargain in good faith over "conditions of employment" can be superseded by a showing that a matter is not a "condition of employment." This is the argument of proponents of the non-negotiability of wages, that the past history under the Executive orders and the cases of the FLRC have indeed been superseded by a different definition of "conditions of employment".

Collective bargaining in the federal workplace extends to "conditions of employment," which are defined as "personnel policies, practices, and matters . . . affecting working conditions."⁶³ The basic proposition is that if Congress had wanted to include wages, it would have so stated. The definition of "condition of employment" is presented as a one-part analysis. The argument notes that other statutes that include wages as a negotiating matter specifically include the term "wages." The NLRA in the private sector authorizes bargaining over "wages, hours, and other terms and conditions of employment."⁶⁴ The Third Circuit accepted this argument and noted that "Congress's use of only 'conditions of employment' implies a narrower range of bargainable matters under the Labor-Management Statute than under the NLRA."⁶⁵ In the Postal Reorganization Act, Congress expressly granted postal workers the right to bargain over "wages, hours, and working conditions."⁶⁶ The distinction is made that wages are "terms" and that hours of employment are "conditions."

First, the concept that the NLRA somehow makes a distinction between wages, hours, terms, and conditions is simply erroneous. In

⁶³5 U.S.C. § 7103(a)(14) (1988).

⁶⁴29 U.S.C. § 158(d) (1988).

⁶⁵Dept. of Navy, *Military Sealift Com. v. FLRA*, 836 F.2d 1409, 1417 (3rd Cir. 1988).

⁶⁶39 U.S.C. § 1201 note (1988) (Labor Agreements).

the section on "Findings and declaration of policy," Congress specified wages and hours as the two basic "working conditions." Congress stated that collective bargaining promotes commerce by encouraging "friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions."⁶⁷ Further, the NLRA provides that labor representatives shall be exclusive representatives of all unit employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."⁶⁸ Both the courts and the National Labor Relations Board have recognized what is clear even in the dictionary, that "terms" and "conditions" are synonymous, and they therefore include wages as "conditions of employment."⁶⁹

There are federal statutes that appear to include pay matters as "conditions of employment." The Senior Executive Service Act provides for a "compensation system, including salaries, benefits, and incentives, and for other conditions of employment."⁷⁰ The law covering federal prisoners on work-release provides for "the rates of pay and other conditions of employment."⁷¹ These statutes are dismissed by those who do not include wages in the term "conditions of employment" because the statutes do not expressly define wages as a "condition of employment."⁷²

"Conditions of employment" is defined as "personnel policies and practices and matters . . . affecting working conditions."⁷³ That language was taken from the Executive orders that first implemented a government-wide labor relations program. As President Kennedy's Task Force stated, "[W]here permitted by law[,] . . . policies relative

⁶⁷29 U.S.C. § 151 (1988).

⁶⁸29 U.S.C. § 159(a) (1988).

⁶⁹Roget's International Thesaurus 383 (4th ed. 1977); Webster Encyclopedia Dictionary, Dictionary of Synonyms and Antonyms 16 (1980 ed.)

⁷⁰See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 714 (1982) (identifying wages, among other things, as being at the core of "terms and conditions of employment"); Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956) (a stock purchase plan constituted "wages" and qualified as "conditions of employment"); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (a retirement and pension plan qualified as wages and conditions of employment); Weyerhaeuser Timber Co., 87 N.L.R.B. 672 (1949) (employer furnished meals were wages and conditions of employment).

⁷¹See also Amicus Curiae Brief (National Treasury Employees Union in support of Respondents) at 10, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁷²5 U.S.C. § 3131(1) (1988).

⁷³18 U.S.C. § 4082(c)(2)(iii) (1988).

⁷⁴Petitioner's Brief at note 9, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁷⁵See *supra* note 12.

to rates of pay” are a proper subject for collective bargaining.⁷⁴ President Kennedy noted that “where salaries and other conditions of employment are fixed by Congress[,] these matters are not subject to negotiation.”⁷⁵ However, if not fixed by Congress, these matters *were* the proper subject for negotiation. Thus President Kennedy’s Executive Order authorized negotiations over “personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements.”⁷⁶ President Nixon retained the same language in Executive Order No. 11,491.⁷⁷ It was under this Executive Order that the FLRC in those two decisions concerning the negotiability of wages read the above language to include pay.⁷⁸ One can make the assumption under the rules of statutory construction that when Congress codified the language of Executive Order 11,491 without change, that it knew of and did not intend to change the judicial and administrative interpretation of that language.⁷⁹

B. “CONDITIONS OF EMPLOYMENT” AS PHYSICAL CONDITIONS

The additional argument of those who do not support the negotiability of wages is that the language “conditions of employment” should be read to refer to the physical conditions under which an employee labors.⁸⁰ As the District of Columbia Circuit stated, “The term ‘working conditions’ ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job.”⁸¹ This argument simply cannot be supported because limiting “conditions of employment” to the physical conditions under which an employee works would exclude the great majority of matters currently negotiated by unions representing federal workers. Such a definition would exclude personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by section 7121(a)(1).

⁷⁴See *supra* note 43.

⁷⁵See *supra* note 44.

⁷⁶Executive Order 10,988, § 6(b); Legislative History, *supra* note 20, at 1214.

⁷⁷Executive Order 11,491, § 11(a); Legislative History, *supra* note 20, at 1250.

⁷⁸See *supra* notes 48-49 and accompanying text.

⁷⁹Florida National Guard v. FLRA, 699 F.2d 1082, 1087 (11th Cir. 1983); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir. 1981). See Respondent’s Brief (Fort Stewart Ass’n of Educators) at 16, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁸⁰Petitioner’s Brief at 17, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁸¹Dept. of Defense Dependents Schools v. FLHA, 863 F.2d 988, 990 (D.C. Cir. 1988).

Such a limited definition would exclude negotiation over every area except safety and office environment.⁸² This is simply not the definition of “conditions of employment” that is understood by those administering the federal labor relations program.

C. INTERPRETATION OF THE STATUTE AND THE DEFERENCE DUE THE FEDERAL LABOR RELATIONS AUTHORITY

There have been different definitions given to “conditions of employment,” but it is also important to consider who is making the interpretation. The FLRA has consistently read “conditions of employment” in the broad sense. It has not been willing to assign the restrictive definition argued by various federal agencies. Does the interpretation of the FLRA hold more weight than that of other federal agencies? As noted, Congress assigned the FLRA the task of developing special expertise in the area of labor relations and of using that expertise to give content to the principles and goals in the FSLMRS.⁸³ The FLRA is “entitled to considerable deference when it exercises its ‘special function of applying the general provisions of the [FSLMRS] to the complexities’ of federal labor relations.”⁸⁴

When the FLRA is exercising its special expertise, its decisions and orders should not be set aside unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸⁵ Also, the FLRA’s findings of fact are conclusive “if supported by substantial evidence on the record considered as a whole.”⁸⁶ Those who disagree with the FLRA on a particular interpretation are quick to point out that “while reviewing courts should uphold reasonable and defensible constructions of an agency’s enabling act . . . they must not ‘rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.’”⁸⁷ It is correct that the FLRA’s interpretation of another agency’s enabling act is not entitled to the deference accorded the FLRA’s interpretation of its own enabling

⁸²Respondent’s Brief (Fort Stewart Ass’n of Educators) at 11, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65).

⁸³See *supra* note 18 and accompanying text.

⁸⁴*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

⁸⁵5 U.S.C. § 706(2) (1988); *New York Council Ass’n v. FLRA*, 757 F.2d 502, 507 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

⁸⁶5 U.S.C. § 7123(c) (1988).

⁸⁷*Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. at 97.

act.⁸⁸ But it is also correct that FLRA interpretations of statutes other than the Civil Service Reform Act are entitled to deference where “interpretation bears directly on the ‘complexities’ of federal labor relations.”⁸⁹

A discussion of the interpretation of the term “condition of employment” turns to a discussion of the FLRA’s enabling act, the FSLMRS. The FLRA’s interpretation that wages are included in the definition of “conditions of employment” is reasonable. During argument before the Supreme Court in the *Fort Stewart Schools* case, Justice O’Connor noted, “The term ‘conditions of employment’ is not self-explanatory. Why should we not defer to the administrative agency’s construction of its own statute?”⁹⁰ Justice Harry Blackmun also observed that the rule of deference to an administrative agency’s interpretation of its own statute was “a great big mountain you have got to get across.”⁹¹

It is indeed a great mountain to get across. The reading of the FLRA of the term “conditions of employment” does not have to be persuasive; it must merely be reasonable. It does not have to be a better or even an equally persuasive argument under the deference due the FLRA; it must just be reasonable. Management in the recent argument before the Supreme Court did argue, however, that the FLRA was unreasonable in its interpretation. They argued that due to the slight variation in the drafting of the Civil Service Reform Act, the FLRA was not entitled to deference.⁹² They were referring to the distinction that wages are “terms of employment” and that hours are “conditions of employment.” The terms-versus-conditions-of-employment distinction is an obscure one at best, and is supported by virtually no authorities.⁹³ It is an argument that cannot overcome the minimal requirements of mere reasonableness that the FLRA’s interpretation has to meet.

⁸⁸*Shanty Town Assoc. Ltd. v. EPA*, 843 F.2d 782, 790 n.12 (4th Cir. 1988).

⁸⁹*U.S. Dept. of Health and Human Services v. FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987).

⁹⁰28 Gov’t Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

⁹¹*Id.*

⁹²*Id.*

⁹³Respondent’s Brief (FLRA) at 22 n.10, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990)(No. 89-65). “Research discloses no court or National Labor Relations Board decision in the 54-year history of the NLRA which parses the relevant phrase in § 8(d) between ‘terms’ and ‘conditions’ of employment.” *Id.*

D. THE SUPREME COURT DEFINES “CONDITIONS OF EMPLOYMENT”

The Supreme Court turned to the dictionary, *Webster's Second New International Dictionary*, and found two meanings for the word “condition.” It can mean matters “established or agreed upon as a requisite to the doing . . . of something else,” and it can also mean “[a]ttendant circumstances,” or an “existing state of affairs.”⁹⁴ The court found the term “conditions of employment” in section 7102 to be susceptible of both meanings, while the term “working conditions” in section 7103(a)(14), in isolation, more naturally refers to the “circumstances” or “state of affairs” under which employees perform their jobs. The court determined that even if the interpretation of the term in isolation was reasonable, it should be interpreted in light of the structure of the whole paragraph. That interpretation, the court found, supported the broader reading of the term that the FLRA advocated.⁹⁵

The court looked at the statutory exceptions to the term “conditions of employment”—“policies, practices, and matters . . . relating to political activities” and “policies, practices, and matters . . . relating to the classification of any position”—and found by differing degrees that they both supported the broader meaning. The only other explanation for such exceptions that would otherwise be technically unnecessary would be that Congress exercised an overabundance of caution. The court found that the petitioners had abandoned this argument in their brief. The court stated:

Petitioner seeks to persuade us, not (as respondent does) that the term “conditions of employment” (as defined to include only “working conditions”) bears one, rather than the other, of its two possible meanings; but rather to persuade us that it bears some third meaning no one has ever conceived of, so that it includes *other* insisted-upon prerequisites for continued employment, but does not include the insisted-upon prerequisite *par excellence*, wages. And this new unheard-of meaning, petitioner contends, is so “unambiguously expressed,” . . . that we must impose it upon the agency initially responsible for interpreting the statute, despite the deference otherwise accorded under *Chevron*. To describe this position is sufficient to reject it⁹⁶

⁹⁴Wester's Second New International Dictionary 556 (1957); *Fort Stewart Schools v. FLRA*, 58 U.S.L.W.4624, 4625 (1990).

⁹⁵*Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624, 4625 (1990).

⁹⁶*Id.* at 4626 (citations omitted).

The court quickly dismissed the argument that pointed to the National Labor Relations Act and the Postal Reorganization Act and attempted to infer some significance to the inclusion or absence of the specific word "wages." "[T]hose other statutes deal with labor-management relations in entirely different fields of employment, and the FSLMRS contains no indication that it is to be read *in pari materia* with them."⁹⁷ Thus, the Supreme Court decisively, in an unanimous opinion, stated that wages were indeed a "condition of employment" and thus subject to the duty to negotiate.

V. MANAGEMENT'S RIGHT TO SET THE BUDGET

A. INTERFERENCE WITH MANAGEMENT RIGHTS

Because wages are "conditions of employment" and potentially a proper subject for negotiation, the next obstacle to negotiation is to determine whether negotiating over wages would constitute interference with a management right. Proponents of non-negotiability contend that wages should be excluded from collective bargaining because negotiating over them would interfere with management's right "to determine the . . . budget . . . of the agency."⁹⁸ Are management rights to be a significant limitation on the obligation to collectively bargain? Representative Clay stated that "the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith."⁹⁹ The House Committee on the Post Office and Civil Service stated:

The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program The committee intends that section 7106 . . . be read to favor collective bargaining whenever there is a doubt as to the negotiability of a subject or proposal.¹⁰⁰

If the intention was that the reading of "management rights" be more narrowly construed than under the previous Executive orders, what was the construction of the term previously? Both Executive

⁹⁷*Id.*

⁹⁸5 U.S.C. § 7106(a)(1) (1988).

⁹⁹124 Cong. Rec. 29,187 (1987).

¹⁰⁰H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978); Legislative History, *supra* note 20, at 690.

Order No. 10,988 and Executive Order No. 11,491 contained provisions allowing an agency to determine its budget. One provided that the agency's bargaining obligation "shall not be construed to extend to such areas of discretion and policy as the mission of the agency [or] its budget."¹⁰¹ The other stated that "the obligation to meet and confer does not include matters with respect to the mission of the agency[or] its budget."¹⁰²

The management rights clause under Executive Order 11,491 did not prohibit negotiations over wages. It was under that Executive Order that the FLRC allowed negotiations over wages in two separate cases. In fact, Representative Ford complained that the FLRC interpretation of the management rights clause under Executive Order 11,491 "stifle[d]" collective bargaining and thus that section 7106 should be "construed strictly."¹⁰³ Thus, collective bargaining was allowed under the previous management rights clauses. Section 7106 is to be construed more narrowly than the clauses under the Executive Orders. Furthermore, if there is doubt, it is to be resolved in favor of collective bargaining. Therefore, it does not appear that the obstacle of management rights is a limitation on the negotiation of wages.

B. BALANCING COSTS AND COMPENSATING BENEFITS

The FLRA has determined that management rights are hindered only when an agency has demonstrated that a union proposal would "directly interfere" with one of those rights.¹⁰⁴ There is a balance that must be struck between protecting only "genuine managerial prerogatives" and not "negat[ing] the Act's broad duty to bargain."¹⁰⁵ The FLRA has devised a test that it believes strikes this balance. First, the FLRA has rejected the proposition that simply because a proposal would impose costs, that it interferes with the management right to set the budget. The FLRA has stated:

¹⁰¹Executive Order No. 10,988, § 6(b), 27 Fed. Reg. 551 (1962), *reprinted in* 1962 U.S. Code Cong. & Ad. News 4269, 4271.

¹⁰²Executive Order 11,491, § 11(b), 43 Fed. Reg. 17605 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 2954.

¹⁰³124 Cong. Rec. 29,198, 29,199 (1978).

¹⁰⁴*Dept. of Defense v. FLRA*, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

¹⁰⁵*EEOC v. FLRA*, 744 F.2d 842, 848-49 (quoting 124 Cong. Rec. 29,199 (1978) (remarks of Rep. Ford); Legislative History, *supra* note 20, at 956).

Such a construction of the Statute could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most . . . would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.¹⁰⁶

One federal circuit has held that an agency cannot rely on monetary considerations or even economic hardship as a reason for refusing to bargain.¹⁰⁷

The test the FLRA has devised to show interference with an agency's budget is twofold. To establish interference, the agency must show that the proposal "attempt[s] to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them," or, where a proposal does not so attempt, the agency must "make[] a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits."¹⁰⁸ Examples

¹⁰⁶American Fed'n of Gov't Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 F.L.R.A. 604, 607 (1980) [hereinafter *Wright-Patterson*].

¹⁰⁷American Fed'n of Gov't Employees, AFL-CIO v. FLRA, 785 F.2d 333, 337-38 (D.C. Cir. 1986).

¹⁰⁸*Wright-Patterson*, 2 F.L.R.A. at 607-08. The full explanation of the *Wright-Patterson* test follows:

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition. As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as

of such benefits are improved employee performance, increased productivity, reduced turnover, and fewer **grievances**.¹⁰⁹

This weighing of cost against compensating benefits is an amorphous concept. In the cases that have unsuccessfully advanced the argument that management's right to determine its budget precludes negotiation over wages, the test has not been fully **applied**.¹¹⁰ That is because in each case the FLRA made a factual finding that the agency did not meet either prong of the test. More specifically, the FLRA did not find that the agency presented evidence that would demonstrate that the proposals would cause substantial and unavoidable cost increases. Thus, no weighing test took place. The factual findings of the FLRA are accepted as long as the record as a whole provides substantial evidence to support such findings.¹¹¹ Because no agency has ever provided the Authority with data in a budget case, the Authority has not issued a decision implementing the compensating benefits aspect of the budget test.¹¹²

It was this lack of evidence in the *Fort Stewart* case that compelled the Supreme Court to find that the Army failed one part of the test, that the agency must show a significant and unavoidable increase in its costs. The court stated:

[The Army] asks us to hold that a proposal calling for a **13.5%** salary increase would necessarily result in a "significant and unavoidable" increase in the agency's overall costs. We cannot do that without knowing even so rudimentary a fact as the percentage of the agency's budget attributable to teachers' salaries. Under the Authority's precedents, petitioner had the burden of proof on this point, but it placed nothing in the record to document its total costs or even its current total teachers' salaries. The Authority reasonably determined that it could not

the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Id.

¹⁰⁹ *Wright-Patterson*, 2 F.L.R.A. at 608.

¹¹⁰ *Nuclear Regulatory Comm'n v. FLRA*, 859 F.2d 302 (4th Cir. 1988); *West Point Elementary School Teachers v. FLRA*, 855 F.2d 936 (2d Cir. 1988); and *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988).

¹¹¹ 5 U.S.C. § 7123(c) (1988).

¹¹² *Respondent's Brief (FLRA)* at 38, note 28, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65).

conclude from an increase in one budget item of indeterminate amount whether petitioner's costs as a whole would be "significant[ly] and unavoidable[y]" increased.¹¹³

The argument that negotiation over wages would interfere with the management right to set the budget has been successful in one case, in which the Fourth Circuit was critical of the FLRA test in its opinion. The court noted that the FLRA had found that the agency had failed to demonstrate that increased costs were not offset by compensating benefits. They continued by stating, "[N]othing in the Statute requires that this showing be made to the satisfaction of the FLRA. As applied to employee compensation, the FLRA's test makes itself, not the agency, the arbiter of the agency's budget."¹¹⁴

This requirement of proof by the FLRA is criticized by management as being unreasonable. It is criticized because it requires an agency to prove a negative—a requirement that could seldom be satisfied. In the case recently argued before the Supreme Court, the union suggested that the compensating benefit would be that higher salaries and improved benefits would "attract better, hard-working teachers."¹¹⁵ This intangible benefit analysis was also questioned by Justice Antonin Scalia during oral argument. Justice Scalia stated that he could not understand this aspect of the Authority's cost-benefit analysis test. He questioned how an intangible and supposedly non-quantifiable benefit, such as an improvement in morale, can be placed on the scale in opposition to an employer's claim that the increased cost of a proposal infringes upon its reserved right to set its budget.¹¹⁶ There is no clear line over which a union proposal crosses in this area. The Acting Solicitor General in *Fort Stewart Schools v. FLRA*, in response to Justice John Paul Stevens's question as to whether a union proposal had to be cost free, conceded that the line had yet to be set. He noted that the threshold beyond which a union proposal's costs grow to the point where they affect an agency's budget has yet to be determined in case law. Yet he argued that in the instant case it was over the threshold, wherever it was.¹¹⁷

It was Justice Scalia, writing the unanimous opinion of the court in the *Fort Stewart* case, who answered his own concerns raised dur-

¹¹³*Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624, 4627 (1990).

¹¹⁴*Nuclear Regulatory Comm'n v. FLRA*, 879 F.2d 1225 (4th Cir. 1989).

¹¹⁵Petitioner's Brief at 30, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 1624 (1990) (No. 89-65).

¹¹⁶28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

¹¹⁷*Id.*

ing oral arguments. He conceded that petitioner's argument that the FLRAs test negates management's right to set the budget has some force if the Authority's definition of "compensating benefits" is as petitioner describes it.

Petitioner claims that, in order to prove that the cost of a given proposal is not outweighed by "compensating benefits," an agency must disprove not only monetary benefits, but also non-monetary "intangible" benefits such as the positive effects that a proposed change might have on employee morale. Although counsel for the Authority agreed with petitioner's statement of its test at oral argument before this Court, it is not entirely clear from the Authority's cases that the "benefits" side of the calculus is as all-embracing as petitioner suggests Indeed, it is difficult to see how the Authority could possibly derive a test measured by nonmonetary benefits from a provision that speaks only to the agency's "authority . . . to determine . . . [its] budget," a phrase that can only be understood to refer to the allocation of funds within the agency.¹¹⁸

The FLRA argues that the cost/benefit analysis is one used frequently in both the private and public sectors.¹¹⁹ They argue that the test is a good one, that it should be allowed to develop in case law, and that it should not be fought by employers.¹²⁰ The test was first developed in the *Wright-Patterson* case, where the issue was not wages but a day care center. The employer, the Air Force, opposed the proposal as costing too much and therefore interfering with the agency's ability to set its budget. The FLRA ruled that the mere cost was not enough to make the proposal nonnegotiable, but that the employer would have to show "that an increase in costs is significant and unavoidable and is not offset by compensating benefits."¹²¹

Balancing intangibles in a case of building a day care center does not seem inappropriate, but balancing improved morale against wage increases is a very tenuous proposition. However, since wage negotiations are appropriate where Congress has not set specific laws, then it would not be appropriate for Congress to foreclose wage negotia-

¹¹⁸Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624, 4627 (1990).

¹¹⁹See, e.g., Executive Order 12,291, 3 C.F.R. 127 (1982) (federal agencies must perform cost/benefit analysis, including non-quantifiable costs and benefits in determining whether to issue a major rule); Butler, *Employer-Sponsored Recreational Activities: Do the Costs Outweigh the Benefits?*, 39 Labor L. J. 120 (1988); Respondent's Brief (FLRA) at 38, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

¹²⁰28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

¹²¹*Wright-Patterson*, 2 F.L.R.A. at 608.

tions through the back door of management rights. The problem seems to be in the test the FLRA has devised. There could be a balancing of interests, but the entire burden should not fall on the agency. The agency would have to show that there would be significant and unavoidable costs. These costs would have to be computed and compared to the overall budget of the agency. The agency should not be allowed to merely point to the initial costs and say there are no compensating benefits. On the other hand, the agency should not have to prove a negative. It is absurd for the union to be able to advance that employees would be happier if they were paid more, and that the agency must prove they would not be happier. Justice Scalia, as noted above, is not entirely convinced that this is the test the agency has to meet. It is still unclear what the test actually may be, because the Court in the *Fort Stewart* case did not have to reach any decision regarding the validity of the FLRA's test.

Justice Marshall, writing a concurring opinion in the *Fort Stewart* case, proposed a more narrow reading of management's right to determine the budget. He stated:

Section 7106(a)(1) is more naturally read, however, as withdrawing from mandatory bargaining only those proposals addressed to the budget *per se*, not those that would result in significantly increased expenditures by the agency To "determine the budget," then, means to calculate in advance the funds available to the agency and the allocation of those funds among the agency's programs and operations. The language of the statute thus exempts from the duty to bargain only those proposals that would involve the union in the budget process itself.¹²²

Justice Marshall also noted that the court did not have to decide whether the test devised by the FLRA was inconsistent with the statute. He wanted to be very clear, however, that the opinion of the Court "does not foreclose a future challenge to that test."¹²³

C. BUDGET OF THE AGENCY

The only agency that was successful in showing that the cost increase would have a significant and unavoidable impact was a small agency. The Fourth Circuit found that salaries and benefits of the Nuclear Regulatory Commission (NRC) constituted more than forty

¹²²*Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624, 4628-29 (1990).

¹²³*Id.* at 4629.

percent of the NRC's annual budget. This amount would significantly affect the NRC's operations.¹²⁴ The Army was not so fortunate in its argument before the Eleventh Circuit. That court found that "any increase in the employees' salaries would not significantly increase the Army's budget; the Army concedes that its budget includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools."¹²⁵

The argument was advanced that whether a proposal has a significant impact should be tested by comparison with the expenditures of the particular program employing the bargaining unit employees, not by a comparison with the entire agency budget.¹²⁶ However, the pertinent language states that "nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . budget . . . of the agency."¹²⁷ And "agency" is defined by the statute as "an Executive agency."¹²⁸ For large Executive agencies the budget right could be argued to be an illusory one.

The Supreme Court in the *Fort Stewart* case did not uphold the Authority's decision by reference to the Army's budget as a whole, as the Court of Appeals had done. Originally, the Authority had concluded that petitioner had not satisfied management's right with respect to its own budget, i.e., that of the schools of Fort Stewart. The Court stated, "[I]t is elementary that if an agency decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself."¹²⁹ The Court easily upheld the FLRA's decision on the more limited comparison against Fort Stewart rather than the entire Army, because, as previously discussed, the Army presented no evidence on either point. The decision of what entity is the relevant agency will have to wait for another day.

D. AGENCY CONTROL OF THE BUDGET VERSUS OUTSIDE AGENCY CONTROL

An argument can be made that the management right to determine the budget means that mandatory negotiation is simply incon-

¹²⁴Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225 (4th Cir. 1989).

¹²⁵Fort Stewart Schools v. FLRA, 860 F.2d 396, 405-06 (11th Cir. 1988).

¹²⁶Petitioner's Brief at 29, Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89-65).

¹²⁷5 U.S.C. § 7106 (1988).

¹²⁸5 U.S.C. § 7103(a)(3) (1988).

¹²⁹Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624, 4627 (1990).

sistent with that principle. Recall that if parties cannot continue to bargain in a good faith effort, then they have reached an impasse. At that time they may request the Federal Services Impasse Panel to consider the matter, and they may agree to adopt binding arbitration.¹³⁰ The possibility then exists that an outside agency could be setting the budget of the agency.

This possibility of outside control over the budget of an agency was the turning point for the case that successfully advanced the management right theory. The NRC was faced with a proposal that salaries would be

adjusted for the cost of living/comparability factor. The adjustment [would] be equal to the statistical adjustment recommended to the President by the [Advisory Committee on Federal Pay, see 5 U.S.C. Sec. 5306]. This adjustment [would] become effective at the announcement of it by the [Committee] or other appropriate sources. It [would] be unaffected by Presidential or Congressional actions.¹³¹

The Fourth Circuit noted that if the union's salary proposal went into effect it would "divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay [T]he NRC would be obligated to adjust its employees' wages and salaries each time the Advisory Committee on Federal pay recommends a general increase in federal salaries."¹³² The court was very clear that Congress vested the NRC with the responsibility of balancing employee compensation against the agency's other goals, and that Congress did not give this authority to the FLRA or to the Advisory Committee on Federal Pay.¹³³

The above proposal illustrates that, while it is not clear where the line is drawn, it is possible to cross it. "Although Title VII imposes a broad duty to bargain, it also demarcates an area of management prerogative which Congress protected in order 'to preserve the Federal Government's ability to operate in an effective and efficient manner.' "¹³⁴

¹³⁰See *supra* note 19 and accompanying text.

¹³¹Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225, 1227 (4th Cir. 1989).

¹³²*Id.* at 1232.

¹³³*Id.* at 1233.

¹³⁴*Id.* at 1232 (quoting National Treasury Employees Union v. FLRA, 691 F.2d 533, 560 (D.C. Cir. 1982)).

VI. PAY SCHEMES FOR FEDERAL EMPLOYEES

A. PREVAILING RATE EMPLOYEES

The third argument centers around the type of statute or regulation that authorizes the pay of federal employees not covered by the General Schedule. The argument concerns employees who are paid under prevailing wage rate determinations and also employees paid under other statutes or regulations.

The distinction can be drawn between salaries paid under a prevailing wage determination and other types of pay schemes because the congressional intent was clear in one instance. The legislative history of the prevailing wage rate statute shows clear congressional intent to allow some bargaining over wages. Some employees covered by the prevailing rate system had historically bargained over their wages. Congress was aware of the practices of those employees when it enacted the prevailing rate system in 1972. Section 9(b) of the Prevailing Rate Act allowed those employees who had traditionally bargained over their wages to continue to negotiate. Section 704 of the 1978 Civil Service Reform Act also continued this practice. It was Representative Ford who offered the amendment, "intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees."¹³⁵

This "grandfather" clause was necessary because of two Comptroller General decisions stating that specific legislation was needed to continue this practice of negotiation over wages. It was also necessary because prevailing wage employees would not be able to continue to negotiate over wages under the FSLMRS, because their pay would be "specifically provided for by Federal statute," namely the Prevailing Rate Act.¹³⁶ The clause allowing employees to bargain applies only to those who historically could bargain prior to 1972. Thus, those employees who did not bargain over wages prior to 1972 and who are covered by the Prevailing Rate Act may not now bargain over wages.¹³⁷

¹³⁵See *supra* note 58.

¹³⁶5 U.S.C. § 7103(a)(14)(c) (1988).

¹³⁷Army and Air Force Exchange Service, Dallas, Texas and AFGE, 32 F.L.R.A. 591, 597, 600 (1988).

There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972 and are thus grandfathered by § 704. Office of Personnel Management, Union Recognition in the Federal Government 331-32, 351-62, 390 (1987); Respondent's Brief (Fort Stewart Ass'n of Educators), Fort Stewart Schools v. FLRA, 58 U.S.L.W. 4624 (1990) (No. 89- 65).

Congress intended to preserve the rights at least of those who could bargain under the Executive orders in this area of prevailing wage determinations. It is possible that Congress also intended all employees who had the ability to bargain under the Executive orders to be allowed to continue such negotiations. Congress certainly, however, did not foreclose bargaining for all employees. The broad language used by a few Congressmen during debates on passage of the FSLMRS is inconsistent with their discussions and knowledge of the prevailing wage rate employees.

B. OTHER STATUTORY AND REGULATORY PAY SCHEMES

There are federal pay statutes other than those outlined under the prevailing wage rate determinations.¹³⁸ These other statutes have vested varying degrees of discretion in the agencies responsible for setting pay. Many agencies operating under these federal pay schemes have supplemented them with internal agency regulations. It is possible for an agency that cannot show the wages of its employees to be "specifically provided for by Federal statute" to show that they are the subject of an agency regulation for which there is a compelling need. If a compelling need for the regulation exists, then the matter is outside the obligation to bargain.¹³⁹ This requirement originated under Executive Order 11,491, because agencies had been unduly restricting the obligation to bargain by implementing agency regulation ~ ~ ~

The FLRA has been tasked with the responsibility of making determinations of whether a compelling need exists for an agency's regulation.¹⁴¹ The FLRA has also been charged with creating regulations that prescribe the requirements an agency regulation must meet in order to establish a compelling need.¹⁴² The FLRA has prescribed that a compelling need exists if one or more of the following criteria are met:

- (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national

¹³⁸ See generally, *There's More to Federal Pay than the GS Schedule*, Wash. Post, Oct. 26, 1982, at A17, col. 1.

¹³⁹ 5 U.S.C. § 7117(a)(2) (1988).

¹⁴⁰ Executive Order No. 11,838, 3 C.F.R. 957 (1971-1975 Comp.)

¹⁴¹ 5 U.S.C. § 7117(b)(1) (1988).

¹⁴² 5 U.S.C. § 7117(a)(2) (1988).

subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.¹⁴³

The FLRA is entitled to great deference when interpreting its regulations, which explicitly implement policies established by Congress or the Executive.¹⁴⁴ Additionally, the burden for establishing that a compelling need exists rests with the agency responsible for the regulation.¹⁴⁵ It is not the responsibility of the FLRA to determine what agency purposes a regulation is designed to achieve or to determine what importance a regulation is to an agency.¹⁴⁶

Therefore, in determining whether agency regulations will bar negotiations over wages, it is important to examine the specific authority under which employees in a particular agency are paid. Obviously, the clearest case concerns employees paid under the General Schedule, because their pay is “specifically provided for by Federal statute.” Those employees who are paid under the Prevailing Wage Rate Act must determine whether they were historically able to negotiate over wages. If so, then the saving clause of section 704 of the Civil Service Reform Act allows them to continue. If they were not able to negotiate prior to 1972, then by negative implication they are now foreclosed from negotiating.¹⁴⁷ Agencies under other federal pay schemes must establish on a case-by-case basis that their pay rates are “specifically provided for by Federal statute.” Each statute must be examined to determine the discretion that has been vested in that particular agency to set pay rates. Finally, the agency may attempt to show that, although not “specifically provided for,” the agency has implemented a regulation to achieve its pay scheme for which a compelling need exists. If any of the above conditions exist, then an agency has met the second part of the two-part analysis and is not obligated to negotiate over wages.

¹⁴³5 C.F.R. § 2424.11.

¹⁴⁴Federal Deposit Insurance Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 439 (1986).

¹⁴⁵5 C.F.R. § 2424.11.

¹⁴⁶AFGE, Local 3804 and Federal Deposit Insurance Corp., Madison Region, 21 F.L.R.A. 870, 881 (1986).

¹⁴⁷See *supra* note 137 and accompanying text.

It is not a difficult task to determine that employees may not negotiate over their pay because their salaries "are provided for by Federal statute." It is not difficult to determine if employees are covered by the Prevailing Wage Rate Act, and if so whether they were historically able to negotiate over their pay. The difficulty arises with determining the amount of discretion vested in a particular agency to set pay rates, or if embodied in a regulation, whether a compelling need exists for such a regulation. Such determinations will require an individual review of the court cases that have examined the question of the negotiability of wages.

VII. CASE LAW ANALYSIS

The cases that have been decided at the appellate level have all occurred in the past few years. Therefore, a review of the cases in a chronological fashion is not particularly helpful in understanding the courts' rationale. A review of the cases grouped by the particular type of pay scheme they operate under is more beneficial.

A. PREVAILING WAGE RATE CASES

One of the first cases at the appellate level was *Military Sealift Command v. FLRA*, a Third Circuit case.¹⁴⁸ The case arose over the negotiability of wages of civilian mariners employed by the Military Sealift Command (MSC). The court engaged in a lengthy discussion of wages as a "condition of employment," and concluded that they were not. This conclusion was reached by a review of some of the all-encompassing statements of Congressmen previously discussed. The court also based this conclusion on the grandfather clause of the Prevailing Wage Rate Act. The court stated:

Congress would not have included or continued [a saving clause] in the prevailing rate system unless a need to explicitly preserve collective bargaining for certain employees existed. The continuing existence of [a saving clause] in the prevailing rate law implies that the prevailing rate system does not encompass collective bargaining and strengthens the presumption against implied repeal as does the insertion of [a saving clause] in the Labor-Management Statute.¹⁴⁹

The court recognized the ability of some federal employees to bargain. It viewed the saving clause in the FSLMRS as foreclosing

¹⁴⁸Dept. of Navy, *Military Sealift Command v. FLRA*, 836 F.2d 1409 (3rd Cir. 1988).

¹⁴⁹*Id.* at 1420.

the ability to bargain over wages, not only for employees who had not historically bargained over wages, but also for all other federal employees unless specifically authorized under the prevailing rate system. The court did not have to reach so broad a rationale in this case, because civilian mariners had not historically negotiated over their wages.¹⁵⁰ If the court had found wages to be a “condition of employment,” negotiations over wages for these employees would still have been foreclosed, because they had not traditionally enjoyed such a right prior to 1972.¹⁵¹

One issue raised by the court and not previously discussed involves the discretion given to an agency to set pay rates. The statute provides that “the pay of officers and members of crews of vessels . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.”¹⁵²

The FLRA held that the above pay statute, because it vested discretion in the Navy and because that discretion was not “sole and exclusive,” subjected wages to collective bargaining. The rationale of the FLRA is that

Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees . . . except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.¹⁵³

As the Third Circuit noted, the “FLRA reaches this result by denying a statutory grant of discretion the status of law and equating its exercise with a rule or regulation unless it finds the grant of discre-

¹⁵⁰*Id.* at 1419n.19. See Petitioner’s Brief at 37, Dept. of Navy, Military Sealift Command, 836 F.2d 1409 (1988).

¹⁵¹This statutory scheme was recognized in *Amell v. United States*, 390 F.2d 880 (Ct. Cl.), *cert. denied*, 393 U.S. 852 (1968). The Court stated: “Plaintiffs are wage board employees. Their wages are not set through collective bargaining negotiations but are fixed by administrative action pursuant to the Federal Employees Pay Act of 1945, 59 Stat. 305, as amended, 5 U.S.C. 946 (1964) and by the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. 1082 (1964).”

¹⁵²*Military Sealift Command*, 836 F.2d at 1412.

¹⁵³National Treasury Employees Union, Chapter 6 and Internal Revenue Serv., 3 F.L.R.A. 748, 759-60 (1980).

tion is 'sole and exclusive.'"¹⁵⁴ The court did not, however, find it necessary to determine whether this test was either properly applied or whether it had any utility in defining the scope of bargaining.¹⁵⁵ The court found that the statute did vest ultimate discretion to set rates of pay in the Secretary of the Navy. The court's rationale was based on its determination that wages were not a "condition of employment" and thus that the FSLMRS did not authorize collective bargaining for federal employees over pay and pay practices. The court found the language of the statute to vest discretion in the Navy to determine the public interest in setting mariners' wages.¹⁵⁶

If the court had found that wages were a "condition of employment," it could have excluded this statute from collective bargaining under the rationale that these employees had not historically bargained over their wages under the prevailing rate system. Absent the "sole and exclusive discretion" test, the court could still have excluded the statute from bargaining if it found that wages of civilian mariners were "specifically provided for by Federal statute." In other words, the statute specifically provides that the Secretary of the Navy will set the wages as nearly as consistent with prevailing wages, and if necessary to balance the public interest. As noted, however, the court gave no guidance on the "sole and exclusive discretion" test.

The D.C. Circuit in *Department of Treasury, Bureau of Engraving and Printing v. FLRA* was faced with a pay statute under the prevailing wage system concerning the pay of electricians that contained identical language to the mariners pay statute in *Military Sealift*.¹⁵⁷ In a non-edifying opinion, the D.C. Circuit stated, "We find the Third

¹⁵⁴*Military Sealift Command*, 836 F.2d at 1415.

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 1416. The Court agreed with the Court of Claims analysis in *National Maritime Union of America v. United States*, 682 F.2d 944, 949, 231 Ct.Cl. 59 (1962) (footnotes omitted) (emphasis in original), when it stated:

"As nearly as is consistent with the public interest" qualifies or limits the main thrust of the sentence, which is "fixed and adjusted from time to time . . . in accordance with prevailing rates." We may draw two conclusions from this structure. First, the primary purpose of the statute is to ensure that the pay of these employees will be comparable to those in the private sector. Second, the public interest is a consideration placed in opposition to equality of pay. The language "as nearly as is consistent with" anticipates that equality of pay may *not* always be entirely with the public interest. These countervailing considerations create a kind of tension in the statute which is crucial to the system, as it provides the administrative discretion needed to operate efficiently a wage system.

¹⁵⁷ 5 U.S.C. § 5349(a) (1988), a section of the Prevailing Rate Act, provides: "The pay of employees [including the electricians in question] in . . . the Bureau of Engraving and Printing . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates . . . as the pay-fixing authority of each such agency may determine"

Circuit's analysis of the statutory language and history entirely persuasive and we adopt that court's reasoning as our own."¹⁵⁸

B. STATUTORY PAY SCHEME

The Fourth Circuit in *Nuclear Regulatory Commission v. FLRA* also found that wages were not a "condition of employment."¹⁵⁹ The court additionally determined that the union's salary proposal conflicted with the Atomic Energy Act (AEA) and was therefore nonnegotiable. The court relied upon the fact that an agency does not have an obligation to bargain over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation."¹⁶⁰

The Nuclear Regulatory Commission (NRC) was given a statutory grant of discretion over the pay rates of its employees if the NRC deemed it necessary to exercise such discretion.¹⁶¹ The FLRA contended that because of that grant of discretion, the obligation to bargain was not inconsistent with the statute. The court agreed with the NRC that the AEA provides "no discretion to depart from General Schedule pay rates is allowed until the Commission makes a finding that the departure is necessary to the discharge of its responsibilities and then such departure can only be to the extent necessary to discharge its responsibilities."¹⁶²

The issue of whether the agency had "sole and exclusive discretion" over the pay rates of its employees did not arise in this case. The FLRA's position seemed to be that if the agency had any discretion at all, whether or not it was "sole and exclusive," then the agency was required to bargain over wages. It should be noted that not all of the Fourth Circuit is in agreement with the above opinion. In fact, the opinion of the court *en banc* vacated the previous panel decision that wages were a "condition of employment" and that bargain-

¹⁵⁸Dept. of the Treasury v. FLRA, 838 F.2d 1341, 1343 (D.C. 1988).

¹⁵⁹Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225 (4th Cir. 1989), *petition for cert. pending*, Nos. 89-108 and 89-562.

¹⁶⁰*Id.* at 1233 (quoting 5 U.S.C. § 7117(a)(1)).

¹⁶¹Atomic Energy Act, § 161(d), provides that the NRC is authorized to appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with [the Classification Act of 1949], except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and compensation fixed without regard to such laws

¹⁶²Nuclear Regulatory Comm'n v. FLRA, 859 F.2d 302 (4th Cir. 1988); *see also* Nuclear Regulatory Comm'n, 879 F.2d at 1233.

ing over wages was not inconsistent with the AEA. The court sitting en *banc* also reversed the panel's opinion that the bargaining of wages did not interfere with the management's right to decide its budget. If the court had found that wages were a "condition of employment," it still might have found the proposal to be nonnegotiable based on the AEA being an inconsistent federal law or because the proposals interfered with the management's right to set its budget.

C. TEACHER'S SALARIES

The last group of cases all concern the salaries of school teachers employed either by the Department of Defense or by the Department of the Army. The Department of Defense school teachers have not been successful in advancing the argument that their wages should be negotiable. The D.C. Circuit's only basis for its opinion was that wages were not a "condition of employment" and therefore were not subject to the duty of collective bargaining.¹⁶³ It should be noted that the argument in this case concerned overtime wages, because the statute covering the pay of Department of Defense Dependents Schools (DODDS) teachers is very explicit that their pay shall be the same as that of teachers in the District of Columbia.¹⁶⁴ If the court had determined that wages were a "condition of employment," it still might have found the issue of overtime to be nonnegotiable because it was inconsistent with federal law. It is a reasonable argument that the terms "compensation, tenure, leave, hours of work, and other incidents of employment" are broad enough to cover not only the base pay of these teachers, but also overtime pay.

The school teachers under the Department of the Army have been much more successful in their quest to make their salaries negotiable. The Eleventh and Second Circuits, in *Fort Stewart Schools v. FLRA* and *West Point Elementary School Teachers v. FLRA*, respectively, have ruled that wages are a "condition of employment" and have determined teachers' salaries to be a proper subject for negotiation. The Sixth Circuit in *Fort Knox Dependent Schools v. FLRA* has ruled to the contrary, but the decision contained a strong dissent echoing the theme that wages are indeed negotiable.¹⁶⁵

¹⁶³Dept. of Defense Dependents Schools v. FLRA, 863 F.2d 988 (D.C. Cir. 1988), *reh'g en banc granted* (Feb. 6, 1989).

¹⁶⁴20 U.S.C. § 241(a) (1988) states: "Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools in the District of Columbia."

¹⁶⁵Fort Knox Dependent Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989).

The pay statute in question in these cases, 20 U.S.C. § 241 (1982), is not under the Prevailing Rate Act. The statute authorizes the operation of what are commonly referred to as section 6 schools for children living on federal property in the United States, including children of members of the armed forces. Section 241 requires the Army, "to the maximum extent practicable," to provide an education comparable to the education in local public schools at a cost per pupil not exceeding the per pupil cost of free education in local communities.¹⁶⁶

The Second Circuit found that the above statute did not provide for teachers' salaries. The court stated:

Indeed, cost parity may be maintained despite wide variations in what teachers are paid. Similarly, educational comparability may be maintained even with wide variations in teachers' pay. Because section 241 does not specifically establish compensation, the Army has the duty under 5 U.S.C. section 7117(a) to bargain in good faith over the salary schedules for teachers.¹⁶⁷

The Army argues that the language of the statute does set the compensation for these employees, because the Army is required to compensate the schools' employees according to local practice. It is a difficult argument that providing a comparable education at the same

¹⁶⁶20 U.S.C. § 241 (1988) provides:

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property—the Secretary may make such arrangements . . . as may be necessary to provide free public education for such children. Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local government authority and it is the judgment of the Secretary . . . that no local educational agency is able to provide suitable free public education for such children. To the maximum extent practicable, the local agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following [citations omitted] . . .

(e) Limits on Payments

To the maximum extent practicable, the Commissioner shall limit the total payments made pursuant to any such arrangement for educating children . . . to any amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State

¹⁶⁷West Point Elementary School Teachers v. FLRA, 855 F.2d 936 (2d Cir. 1988).

cost per pupil rate of free public education in local communities "to the maximum extent possible" requires identical teacher salaries. As Justice Scalia noted during oral arguments in the *Fort Stewart* case, the requirement that education and expenditures be comparable to local civilian schools offers a lot of room to maneuver, because comparable does not mean identical. He observed, "There's a lot of room for bargaining within the playpen of comparability."¹⁶⁸

In both the *Fort Stewart* and *Fort Knox* cases, management asserted that proposals to negotiate over wages were inconsistent with Army regulations for which there was a compelling need.¹⁶⁹ The Army argued that the statute is essentially nondiscretionary in mandating that teachers salaries will be identical to those in the local community. Thus, the regulation is implementing a mandate to the agency that is nondiscretionary in nature, and therefore that there is a compelling need for the regulation.

This argument was rejected in both cases for the obvious reason that the courts did not find the language of the statute to be nondiscretionary. In fact, in the *Fort Stewart* case the court reviewed the legislative history of the pay statute and found that the Army had requested an amendment to the statute in 1965 to pay its teachers in accordance with the entire teaching profession.¹⁷⁰ This was in response to a 1959 Comptroller General decision, which stated

¹⁶⁸28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

¹⁶⁹Army regulation 352-3.1-7 provides:

Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following facts are, the maximum extent practicable, equal:

- a. Qualifications of professional and nonprofessional personnel.
- b. Pupil-teacher ratios.
- c. Curriculum for grades offered, including kindergarten and summer school, if applicable.
- d. Accreditation by State or other accrediting association.
- e. Transportation services (student and support).
- f. Length of regular and/or summer term(s).
- g. Types and numbers of professional and nonprofessional positions.
- h. Salary schedules.
- i. Conditions of employment.
- j. Instructional equipment and supplies.

¹⁷⁰1965 U.S. Code Cong. & Admin. News 1913. The Army commented that the federal pay acts did not accommodate the teaching profession because of the difference between salaries on a school year basis and a calendar year basis. Also, teachers receive set pay for extracurricular activities while federal employees receive overtime. The Army concluded: "Based upon the Department's experience in operating dependent schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teacher profession rather than those which have been developed for the Federal Service as a whole."

that the Army could not compensate its teachers according to the salaries in a neighboring city.¹⁷¹

The Army in the *Fort Stewart* case asked the court to conclude that Congress excepted teachers' wages from the civil service laws so that they would be comparable to those in local public schools. The Court stated:

That is not so. All that can reasonably be deduced from the exclusion of the General Schedules is that Congress expected teachers' wages and benefits to be one of the elements that the federal agency could adjust in order to render per pupil expenditure comparable to that in local public schools. But to be able to adjust is not to be required to make equal. The statute requires equivalence ("[t]o the maximum extent practicable") in total per pupil expenditure, not in each separate element of educational cost. An agency may well decide to pay teachers more or less than teachers in local schools, in order that it may expend less or more than local schools for other needs of the educational program. It is thus impossible to say that the requirement of Army Reg. 352-3 (1980) that teachers' salaries be "to the maximum extent practicable, equal" was "essentially nondiscretionary in nature" within the meaning of § 2424.11(c).¹⁷²

The Court noted that the petitioners chose to assert their claim that there was a "compelling need" for their regulation under only the third criteria. The Army did not chose to assert a claim that its regulation either was "essential . . . to the accomplishment of the mission or the execution of functions of the agency" or was "necessary to insure the maintenance of basic merit principles."¹⁷³ Thus, these arguments are also left for another day and another case.

Both the Eleventh and Second Circuits also rejected the argument that negotiating over wages interfered with the agency's right to set its budget. As discussed previously, no agency has provided any data to the FLRA to show that such increases would be significant and unavoidable. Both circuits therefore gave deference to the conclusion of the FLRA that the Army failed to make the requisite demonstration of interference with its budget.

¹⁷¹*Fort Stewart Schools*, 860 F.2d at 403.

¹⁷²*Fort Stewart Schools v. FLRA*, 58 U.S.L.W.4624, 4628 (1990).

¹⁷³See *supra* note 143 and accompanying text.

The dissent in the *Fort Knox* case is the only opinion to date to recognize the distinction between salary schedules under the prevailing wage rate determinations and other statutory or regulatory pay schemes. The dissent noted that the courts in *Military Sealift* and *Department of Treasury* both held that wages were exempt from bargaining. The court in *Department of Defense Dependent Schools v. FLRA* relied on those two decisions to find that the legislative history indicated that congressional intent was to exempt pay from negotiability. The dissenting judge stated, “[I]n my judgment, that decision underestimated the importance of the Prevailing Rate Acts in the *Sealift* and *Treasury* decisions. The Prevailing Rate Acts are what rendered wages unbargainable in those cases, not the court’s interpretation of the FSLMRS.”¹⁷⁴ The dissent found that *West Point* was a more sensible decision and was more consistent with the relevant legislative history. Thus the dissent found wages to be a “condition of employment” and found no compelling need for the Army’s regulation, because it was not implementing a nondiscretionary mandate.

VIII. CONCLUSION

The point is now well settled that wages are a “condition of employment” and therefore subject to negotiation, unless they are “specifically provided for by Federal statute” or unless negotiations would be inconsistent with federal law, a government-wide rule or regulation, or an agency-wide rule or regulation for which a compelling need exists. Finally, wages would not be subject to negotiation if such negotiations would interfere with a management right, such as the right of an agency to determine its budget.

Federal appellate courts are divided in their rationale and divided in the results. Because the Supreme Court has decided that wages are a “condition of employment,” the appellate courts will be forced to reconsider their positions. While all of the circuits will have to accept that wages are a “condition of employment” and therefore subject to negotiation, it is still possible that the results of the cases will remain the same. Cases such as the *Military Sealift Command* could demonstrate that the wages of the employees were not previously negotiable under the prevailing wage acts and that the parties are now foreclosed from negotiating over wages. The Department of Defense Dependents Schools could show that its statute would make bargaining inconsistent with federal law, because it is

¹⁷⁴*Fort Knox*, 875 F.2d at 1184.

required to have the same salaries for overseas teachers as the District of Columbia provides for its teachers. The future of bargaining by the electricians in the *Nuclear Regulatory Commission* case may depend upon an argument made under the “compelling need” criteria for the agency to continue to have discretion in this area.

The Supreme Court did not have to reach the question of the importance of the Prevailing Rate Act in the *Fort Stewart* case, and the Court did not have to reach the question of the “sole and exclusive discretion” test. Because the Supreme Court deferred to the conclusion of the FLRA on the agency’s right to determine its budget, the Court did not have to reach the balancing test of significant and unavoidable costs versus compensating benefits.

The decision that wages are a “condition of employment” will certainly make many agencies examine how they do business with regard to negotiation with employees over wages, but it is possible that very few agencies will actually have to change the way they operate. Even the FLRA, which has been the most outspoken proponent of the theory that wages are a negotiable “condition of employment,” concedes that few of the employees under pay schemes not entirely set by statute would be able to bargain over wages, because many of the pay schemes contain specific standards that the agencies have to meet.¹⁷⁵

The main impact of a decision in the *Fort Stewart* case that wages are a negotiable “condition of employment” will be that agencies subject to pay schemes not entirely set by statute will have to carefully examine the language and history of their individual pay statutes. Those courts that have previously relied upon the assertion that wages are simply not negotiable will have to determine whether the pay schemes they have examined are now negotiable because they do not meet the second part of the analysis.

¹⁷⁵Respondent’s Brief (FLRA) at 17, *Fort Stewart Schools v. FLRA*, 58 U.S.L.W. 4624 (1990) (No. 89-65). The FLRA, after battling over the pay schemes of numerous employees, concedes:

Of the “forty-odd federal pay systems which are not entirely set by statute” referenced in *Dept. of Defense Dependents Schools v. FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), *reh’g en banc granted* (Feb. 6, 1989), employees under only a few of those systems would be able to negotiate on compensation under the Authority’s case law. Most of these forty pay systems contain specific standards to be met by agencies in setting pay, thus removing pay determinations from the scope of negotiable agency discretion. *See, e.g.*, *American Federation of Gov’t Employees and Dept. of Defense, Dept. of the Army and Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas*, 32 F.L.R.A. 591 (1988) (proposal to increase commission rates nonnegotiable for employees subject to the Prevailing Rate Systems Act).

The teachers who are employed by the Department of the Army are now able to negotiate over their wages. The remedy for the Army, if this is not a desirable option, is of course to appeal to Congress to change the pay statute. The salaries of dependent school teachers would have to be set by Congress so that the Army would have no discretion in the matter. The other option is that the pay of dependent school teachers could be aligned with the civil service grades and thus covered by the General Schedule.¹⁷⁶

The Supreme Court has declared wages to be a negotiable "condition of employment," and the negotiability of wages will impact a variety of agencies and employees for many years to come. Those who previously attempted to negotiate over wages, but were unsuccessful, will want to try again. Those who thought they were foreclosed from bargaining over wages may want to reconsider. Ultimately, for many agencies, the results may not change.

¹⁷⁶An additional matter, not discussed in this article, is that in *West Point Elementary School Teachers v. FLRA*, 855 F.2d 936 (2d Cir. 1988), the court declared the Army's use of personal service contracts in hiring civilian teachers to be an unlawful hiring practice because the Army did not have specific statutory authority to use such contracts. Thus, in any event, the Army will have to alter its method of hiring dependent school teachers.

OPEN HOUSES REVISITED: AN ALTERNATIVE APPROACH

by Major J. Bryan Echols*

I. INTRODUCTION

Do open houses at military installations open the door to any and all groups wishing to promulgate their messages? For some time, this question has troubled military commanders and their attorney advisors when they have attempted to exclude politically oriented groups from participation in open house activities. Despite a number of cases involving these claims¹ and a number of articles suggesting resolutions to the problem,² there remains much confusion today over whether commanders may constitutionally exclude certain categories of speech from open house activities.

The uncertainty within the military and the inconsistent resolution of the cases by federal courts stems from the current Supreme Court approach to questions of governmental suppression of speech activities where the context of the speech serves as the basis for different treatment. As has been noted elsewhere, the categorical forum approach used by the Court is more conclusory than analytical and provides little predictability for those seeking guidance.³

Part II of this article discusses the Supreme Court's current approach to these contextual cases of expressive regulation and the

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¹See, e.g., *United States v. Albertini*, 710 F.2d 1410 (9th Cir. 1983), *rev'd and remanded*, 472 U.S. 675 (1985), *on remand*, 783 F.2d 1434 (9th Cir. 1986); *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir.) (en banc), *cert. denied*, 459 U.S. 1092 (1982); *Brown v. Palmer*, 689 F. Supp. 1045 (D. Colo. 1988); *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.).

²See, e.g., Maizel and Maizel, *Does an Open House Turn a Military Installation Into a Public Forum?* *United States v. Albertini and the First Amendment*, The Army Lawyer, Aug. 1986, at 11; Zillman and Imwinkelreid, *The Legacy of Grew v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 Geo. L.J. 773 (1977); Hawken, *Griffen v. Griffiss Air Force Base: Qualified Immunity and the Commander's Liability for Open Houses on Military Bases*, 117 Mil. L. Rev. 279 (1987); Rosenow, *Open House or Open Forum: When Commanders Invite the Public on Base*, 24 A.F.L. Rev. 260 (1984); Cruden and Lederer, *The First Amendment and Military Installations*, 1984 Det. C.L. Rev. 845.

³See, e.g., L. Tribe, *American Constitutional Law* 988 (1988).

inconsistent results in military open house cases resulting from its application. The article then reviews some of the problems posed for military commanders by the current approach. Part III describes an alternative analytical approach to these first amendment cases suggested by Professors Daniel Farber and John Nowak, and then comments on the advantages of their method over the present analytical framework that the Court uses. Part IV applies this different approach to the question of military open houses, addressing some of the more common objections to military efforts to exclude political speech at open houses.

11. THE PUBLIC FORUM APPROACH

Over the years, the Supreme Court has developed a fairly coherent approach to two types of free speech cases. When government has attempted to restrict an entire category of speech, such as obscenity, the Court has relied mainly on a definitional approach. If the subject speech is included in one of several categories of unprotected speech, then the regulation is permissible.⁴ If, on the other hand, the speech does not fall into the narrowly defined categories of unprotected speech, the speech is absolutely protected, despite potential offense to a majority of the local community.⁵

The Court has also been successful in devising an analytical scheme for time, place, and manner restrictions on speech. In these cases the Court balances the government's interest against the interests of the proponent of the expressive activity and upholds reasonable, nondiscriminatory regulations.⁶ In general, time, place, and manner restrictions must be content-neutral, narrowly tailored to serve a significant government interest, and must leave open ample alternative channels of communication.⁷

Since the 1970's, however, the Supreme Court has faced a growing number of cases that have not fallen readily into either of the above categories. Instead, these cases have involved restrictions on certain types of speech as they relate to certain contexts. These cases do not involve traditionally unprotected speech, and because the regula-

⁴See *Roth v. United States*, 354 U.S. 476 (1957).

⁵*Cf. Cohen v. California*, 403 U.S. 15 (1971); *National Socialist Party of America v. Village of Skokie*, 578 F.2d 1197 (7th Cir. 1978).

⁶See generally *L. Tribe, supra* note 3, at 977-81; *Adderly v. Florida*, 385 U.S. 39 (1966).
⁷*Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

tions are not content neutral,⁸ the regulations would fail under a traditional time, place, and manner approach.

In 1983 the Court clarified its approach to these cases by delineating the different kinds of forums in which speech occurs.⁹ According to the Court, there are three types of forums: traditional public forums; designated public forums; and non-public forums. Traditional public forums are those that have been “by long tradition or by government fiat . . . devoted to assembly and debate,” such as streets and parks.¹⁰ In these “quintessential public forums,” content-based regulation must necessarily be related to a compelling state interest and must be drawn narrowly to achieve that end.”

The second category is “property which the State has opened for use by the public as a place for expressive activity,” or a designated public forum.¹² Although not required to create a forum in the first place, or to retain its open character, once the state chooses to do so it is bound by the same restrictions present in the traditional public forum.¹³ For example, although a school is normally a non-public forum, if the school was used for a political meeting, then the use would result in designating that place as a public forum.¹⁴ Time, place, and manner restrictions applied in either the public or designated public forums must comply with the above-stated requirements.¹⁵

The final category is the non-public forum, which may be reserved by the state “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an

⁸It may be helpful to point out the difference between content neutrality and viewpoint neutrality. Content neutrality refers to the government not drawing distinctions between subjects of speech, such as religious versus commercial or political versus informative. Viewpoint neutrality refers to the government not drawing distinctions based on the speakers stance on an issue, such as pro-choice versus anti-abortion or pro-military versus anti-military. While content neutrality is generally required, this article will be discussing the ability of government to discriminate on the basis of the content of speech insofar as its content is deemed political. While normally one may assume that viewpoint neutrality is required in all cases, I will discuss whether even that proposition is necessarily true. *See infra* text accompanying note 61.

⁹*Perry Education Ass'n*, 460 U.S. 37 (1983).

¹⁰*Id.* at 45.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 46.

¹⁴There has been some disagreement as to whether a “temporary” public forum exists. *Compare Persons for Free Speech at SAC*, 675 F.2d at 1015 with *Albertini*, 710 F.2d at 1416-17. Those claiming a temporary public forum have the better argument, because the notion of a designated public forum includes the ability of the government to designate not only the site, but also the duration of the forum.

¹⁵*Perry Education Ass'n*, 460 U.S. at 46. *See supra* discussion accompanying note 7.

effort to suppress expression merely because public officials oppose the speaker's view."¹⁶ Notice that a non-public forum allows the government to exercise some content-based discrimination between expressive activities, allowing some but restricting others.

Once it defined these three types of forums, the Court's approach has been to consider the particular restriction that the government imposed in a case, to determine which of the types of forums is involved, and then to measure the restriction against the applicable standard for that forum. Use of this system has led the Court to uphold a ban on placing unstamped mailable material in mailboxes,¹⁷ a refusal to sell bus advertising to political candidates,¹⁸ a denial of use of a school's internal mail system for a union rivaling the designated bargaining representative,¹⁹ and a ban on posting leaflets on utility poles.²⁰ By contrast, public forum analysis has led the Court to strike down the ability of a city theater to refuse to permit the performance of the musical *Hair*²¹ and the ability of the federal government to exclude expressive activity on the sidewalk in front of the Supreme Court itself.²²

The use of these categories has been criticized by many as adding little to the analysis and predictability of such first amendment questions. Whether a forum is public, temporarily public, or non-public is perhaps clear at the extremes, but the Court has been unclear concerning the criteria for determining the type of forum involved. Originally, the Court used a historical test for determining the status of a site.²⁴ In the 1970's, however, some members of the Court appeared to adopt a "compatibility test."²⁵ Thus, even sites not tradi-

¹⁶*Id.*

¹⁷*U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

¹⁸*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

¹⁹*Perry Education Ass'n*, 460 U.S. 37 (1983).

²⁰*City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

²¹*Southeastern Promotions, Inc. v. Conrad*, 420 U.S. 546 (1975).

²²*United States v. Grace*, 461 U.S. 171 (1983).

²³*Cf. L. Tribe, supra* note 3, at 986-97.

²⁴*Cf. Greer v. Spock*, 424 U.S. 828 (1976).

A necessary concomitant of the basic function of a military installation has been "the *historically* unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command." . . . The notion that federal military reservations . . . have *traditionally* served as a place for free public assembly and communication . . . is thus *historically* and constitutionally false. *Id.* at 838 (citations omitted, emphasis added) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961)).

²⁵*Cf. Grayned v. City of Rockford*, 408 U.S. 104 (1972). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

tionally held to be public forums could not restrict speech that was compatible with that forum's use. In other cases, the Court seemed to place emphasis on governmental efforts to maintain the closed nature of a forum in determining the nature of the forum.²⁶ Thus, there is confusion over what criteria to use in determining into which category a forum falls.²⁷

After determining the appropriate category of the applicable site, there has been a tendency to ignore all other considerations in determining whether the restriction is constitutional. If a forum is deemed to be public, virtually all speech is protected. If a forum is deemed to be non-public, virtually all restrictions are upheld. In both cases, the oversimplification inherent in the public forum approach results in a failure to explore both the legitimate interests of government and the free speech interests of the public in a given case.²⁸

For the military commander seeking to decide what groups may participate in an open house or for a staff judge advocate providing advice to the commander, the public forum analysis has been completely unhelpful. It must be noted that military bases have been viewed as the quintessential non-public forum.²⁹ The authority of military commanders to exclude the public from areas under their control has been limited only by a requirement that the commander not be arbitrary and capricious.³⁰ The Supreme Court clearly has recognized a distinction between federal military reservations and traditional public forums such as municipal streets and parks. In only one case, *Flower v. United States*,³¹ involving a public street running down the middle of an Army installation, has the Supreme Court

²⁶Cf. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985) (lack of government intent to open up to wide range of expressive activity determinative of non-public forum status).

²⁷I do not mean to suggest that the Court has uniformly adopted any of these approaches at any point in time. Indeed, it is the fact that individual Justices approach the question of the status of the forum with such divergent criteria that contributes to the confusion.

²⁸See Farber and Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1224 (1984).

²⁹*Greer v. Spock*, 424 U.S. 828, 838 (1976). In reaching this conclusion, the Court seemed to rely on the historical test for forum analysis. One may argue as well that a non-public forum categorization would result from a compatibility analysis. "And it is consequently the business of a military installation . . . to train soldiers, not to provide a public forum." *Id.*

³⁰*Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). For a commander's barment from his or her installation to be valid, the arbitrary and capricious standard requires only that the reason be rational and non-discriminatory. As the Court said, "[a person] could not be kept out because she was a Democrat or Methodist." *Id.* at 898.

³¹407 U.S. 197 (1972).

determined that part of a military installation is public, and that was based on a determination that the military had "abandoned any right to exclude civilian vehicular and pedestrian traffic from the avenue."³²

Yet when the military opens the installation to the public during an open house, the question of public forum is raised once again. If, as some argue, the open house activity creates a temporary public forum, then content-based restrictions may be justified only by using the least restrictive means to achieve a compelling governmental interest.³³ On the other hand, if the installation remains a non-public forum, restrictions on speech are allowed based on content, unless based on the viewpoint of the speaker.

Typically, the military open house cases have involved anti-war groups or other demonstrators who have desired to hand out leaflets or man information booths during the open houses, in a fashion similar to other groups that have been allowed to participate as part of the open house activities.³⁴ Installation commanders have sought to deny permission or to exclude these groups based on a stated desire to avoid turning the open house into a forum for the discussion and debate of political questions.³⁵

This is not an issue that can be ignored by military officials or resolved merely by refusing to hold open houses. The open house is viewed as an important part of the Air Force mission, particularly to the maintenance of base-community relations.³⁶ Commanders are specifically encouraged to hold open houses yearly,³⁷ and significant assets are devoted to the events.

³²*Id.* at 198.

³³*See supra* text accompanying note 11.

³⁴*See, e.g.*, *Brown v. Palmer*, 689 F. Supp. 1045 (D. Colo. 1988); *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.).

³⁵*Cf.* *Brown v. Palmer*, 689 F. Supp. at 1048:

According to [the installation commander,] Col. Palmer, "As a matter of long standing policy, the Department of the Air Force does not engage in any activities which might be interpreted as associating the Department with particular ideological or political causes, parties or candidates At Peterson [Air Force Base] we have a consistent policy of not allowing the organized dissemination of material advocating political or ideological positions, or allowing solicitation of people to advocate causes."

³⁶"'Open House' celebrations are an integral part of the overall Air Force mission, and help provide the vital link of public awareness that is so important to the federal military forces in a democracy [and are] oriented toward base-community relations." *Brown v. Palmer*, 689 F. Supp. at 1048 (Declaration of United States Air Force Chief of Staff General Larry D. Welch) [hereinafter Welch Declaration].

³⁷Air Force Reg. 190-1, Public Affairs—Public Affairs Policies and Procedures. para. 5-31 (1 March 1989) [hereinafter Air Force Reg. 190-1].

At the same time, commanders who choose to hold open houses face a real threat that their resources may be consumed and their personnel threatened if they attempt to exclude politically oriented groups from the open house activities. Probably the most serious case involves Griffiss Air Force Base, in which the wing commander, base commander, an assistant staff judge advocate, and a security policeman face personal monetary liability as a result of *Bivens*³⁸ actions arising out of the 1984 open house.³⁹

Most troubling to the military commander and the staff judge advocate attempting to decide these questions is the lack of predictability of whether the courts will determine the open house to be a public or non-public forum. Air Force open house cases decided using the public forum categories have yielded wildly inconsistent results. In some instances, the courts have concluded that the open houses were not public forums, and that exclusion of anti-war demonstrators was permissible.⁴⁰ In others, the courts have concluded that the installation was a public forum during the open house and that limitation of expressive activity by base officials was constitutionally impermissible absent a compelling governmental interest, which the courts have rarely found.⁴¹

Courts deciding that the open houses are not public forums have viewed several factors as important. They generally conclude that an open house is supportive of and consistent with the military mission.⁴² Accordingly, the open house does not change the presumed non-public forum status of the base. Second, they find that the Air Force is not engaging in speech subject to rebuttal by others because it is speech in support of the mission that has been dictated by the political branches of government.⁴³ Rather than entering into debate

³⁸*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing personal cause of action against federal employees who violate plaintiff's constitutional rights).

³⁹*Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.).

⁴⁰*Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010, 1016 (8th Cir.) (en banc), *cert. denied*, 459 U.S. 1092 (1982).

⁴¹*See, e.g.*, *United States v. Albertini*, 710 F.2d 1410 (9th Cir. 1983), *rev'd and remanded*, 472 U.S. 675 (1985), *on remand*, 783 F.2d 1434 (9th Cir. 1986); *Brown v. Palmer*, 689 F. Supp. 1045 (D. Colo. 1988).

Nor is it likely that such a compelling state interest would be found, because the courts have generally been very reluctant to find interests of the government so strong as to deprive individuals of otherwise recognized rights. In addition, where such a compelling state interest has been found, the government must use the least restrictive means to further the interest, and courts are creative enough to find lesser restrictive means in almost any case. *See supra* text accompanying note 11.

⁴²*Persons for Free Speech at SAC*, 675 F.2d at 1017.

⁴³*Id.*

over the propriety of military activities, the Air Force is reporting on how it is fulfilling its assigned mission. Finally, the courts point to the extensive control over the open house by base officials to show that, unlike *Flower*,⁴⁴ the military has not abandoned control over the installation.⁴⁵

Each of these conclusions have been rejected by other courts. With respect to the consistency of open houses with the overall military mission, courts have instead concluded that an open house, which disrupts normal mission activity, is a significant departure from the traditional military mission.⁴⁶ This is especially persuasive to the courts when the approved open house activities include such diverse groups as chambers of commerce and chapel activities.

As to the element of governmental speech, instead of agreeing that Air Force "speech" is not designed to enter into the debate over the course of American military power, the courts have found that the Air Force's stated purpose of seeking to "assist the American people . . . in their understanding of . . . the need for continual research, development and modernization of Air Force systems"⁴⁷ demonstrates that the open house is an attempt to argue for continued support for a powerful military.⁴⁸ When the courts have viewed the Air Force as presenting its side of the argument over national defense policy, it seems courts desire to give the "other side" equal time out of a sense of fairness.

The third point raised by those courts upholding the non-public nature of open houses is that the military has continued to exert control over the activities, thus demonstrating that the event is not a public forum. Although this is a logical argument, it is a troubling one from a first amendment view. If the government is said to have maintained the status of a non-public forum by controlling what speech is allowed, then the right to public speech is a matter of governmental discretion alone.⁴⁹ This position has resulted in courts that are suspicious of even good faith efforts on the part of the

⁴⁴*Flower v. United States*, 407 U.S. 197 (1972).

⁴⁵*Persons for Free Speech at SAC*, 673 F.2d at 1015-16.

⁴⁶*Brown v. Palmer*, 689 F. Supp. 1045, 1051 (D. Colo. 1988).

⁴⁷Air Force Reg. 190-1, para 1-3 (16 Feb. 1982). This language has been deleted from the current Air Force Reg. 190-1. The current doctrine does emphasize the need for promoting knowledge and understanding of "Air Force readiness for countering . . . threats, [and] resources needed to maintain readiness." Air Force Reg. 190-1, para. 1-1 (1 March 1989).

⁴⁸*Albertini*, 710 F.2d at 1415.

⁴⁹*Cf. L. Tribe. supra* note 3, at 995.

military to draw distinctions between groups allowed to participate in the open houses, because it appears that government discretion is so unrestrained.

The Supreme Court had an opportunity to determine the status of military open houses in the 1985 case of *Albertini v. United States*.⁵⁰ That case involved a conviction for entering the base during an open house, after the defendant previously was barred from reentry by the base commander. The defendant claimed that the open invitation of the base for the open house removed the ability of the commander to exclude him, at least for that one day. Although the Court decided the case on other grounds,⁵¹ there was strong dicta that military open houses are not public forums.⁵² Even if the Court had reached a conclusion on the public forum question, a later court could question whether differing facts provide the basis for a different conclusion. As a result, strong uncertainty continues as to the right of groups to advocate their political causes and the right of the military to exclude politically oriented groups from open houses.

111. THE FOCUSED BALANCING APPROACH

In their article, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*,⁵³ Professors Daniel A. Farber and John E. Nowak propose an alternative approach to resolving cases of what they refer to as situational restraints, those instances of regulation that are not content neutral but apply only to particular speakers in particular physical contexts. Under their approach, "the government may regulate content in that environmental context only as long as its goals are unrelated to censorship and it does not restrict the flow of ideas in society as a whole."⁵⁴ They term their approach "focused balancing."⁵⁵ The focused balancing approach seeks to give weight to first amendment values, while at the same time recognizing legitimate governmental interests in particular contexts of speech.

⁵⁰472 U.S. 675 (1986).

⁵¹The Court held that even if the open house were a public forum, the receipt by the defendant of a bar letter "distinguished him from the general public." *Id.* at 686.

⁵²"The conclusion of the Court of Appeals that Hickam was ever a public forum is dubious. Military bases generally are not public fora, and *Greer* expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.' " *Id.* at 686 (quoting *Greer v. Spock*, 424 U.S. at 836).

⁵³Farber and Nowak, *supra* note 28.

⁵⁴*Id.* at 1240.

⁵⁵*Id.*

Focused balancing employs a three-step process of analysis. The first step requires a court to examine the governmental goal of the challenged restraint or regulation.⁵⁶ To ensure that this is not *post hoc* formulation, the government, not the court, must clearly articulate the goal of the restriction at the time it imposes the restriction.⁵⁷ The goal must also apply to the kind of speech regulated as it relates to the specific context in which the speech occurs. This first step is referred to as the "articulation requirement."⁵⁸

The second step is to inquire into the permissibility of the goal.⁵⁹ Generally, goals are permissible when they are viewpoint neutral.⁶⁰ Even here, however, exceptions exist to requiring strict viewpoint neutrality.⁶¹ At a minimum, the goal must be "unrelated to the suppression of free expression."⁶²

Third, the court must apply a balancing of the goal sought by the government against the burden that pursuit of the goal places on speech.⁶³ This focused balancing takes into account not only the speech interest of the individual challenging the regulation, but also the interests of the entire class of speech previously identified by the government as that encumbered by the articulated goal. In addition, the court must weigh in the balance the "profound national commitment" to free speech.⁶⁴ In balancing the interests involved, the court must determine whether the regulation is reasonably likely to attain the desired goal and whether the goal is sufficiently important to justify the means.⁶⁵

A balancing test, however rigorous in its required analysis, is hardly a novel approach to resolving conflicts between government interests and civil liberties. Moreover, balancing tests are inherently dependent on the values held by individual judges and Justices. Yet when the Constitution grants legitimacy to two competing values, such as

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* at 1243.

⁶⁰*Id.*

⁶¹For example, a military commander may choose to espouse patriotic ideals and the necessity of obedience to orders, while denying equal ability to others who would espouse a philosophy detrimental to good order and discipline. *Cf. Greer v. Spock*, 424 U.S. 828, 840 (1976).

⁶²"Farber and Nowak, *supra* note 28, at 1241 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

⁶³*Id.* at 1242.

⁶⁴*Id.* at 1243 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁶⁵*Id.*

the ability of government to function and the public's right to speak, there must be a means of granting preference to one or the other in a specific application.

In balancing these competing values, care must be taken to avoid identifying the values at stake either too broadly or too narrowly. All too frequently, governmental issues are identified with the very existence of our nation. If the court identifies the governmental interest as national security or military loyalty, discipline, and morale, it is highly unlikely that *any* individual interest will be found to outweigh such interests.⁶⁶ At the same time, individual interests often are narrowly construed as the interests of only that particular individual. While that is certainly the interest at stake in a particular case, there is clearly a collective interest of all persons in the exercise of civil liberties such as speech.

The focused balancing approach avoids these dangers. By requiring the goal of the government restriction to be articulated with specific relation to the type of speech and the particular activity involved, invocation of broad interests such as national security are avoided in favor of an explanation of how this particular activity relates to that broader interest. Professors Farber and Nowak also are adamant that the interest in speech must not be limited to the particular litigant or the particular message, but must be viewed as the interest of all the public in similar speech.⁶⁷

A further criticism of the balancing approach is its dependence on the values of the judges or Justices determining the outcome of the case. Farber and Nowak reply that value judgments are unavoidable in cases where competing interests have legitimate claims to enforcement.⁶⁸ It may also be argued that open articulation of this balancing of values and the identification of the values themselves is far more likely to give credibility to judicial determinations than claims to objectivity consisting of applying labels such as public forum on unrevealed value judgments.

Although the focused balance analysis is designed to be applied to all situational restrictions, it has particular relevance to cases involving political speech at military open houses. The next part of this article applies the approach to the open house cases.

⁶⁶*Cf. Korematsu v. United States*, 323 U.S. 214 (1944) (justifying internment of Japanese Americans in World War II).

⁶⁷Farber and Nowak, *supra* note 28, at 1243.

⁶⁸*Id.* at 1244.

IV. APPLYING FOCUSED BALANCING TO MILITARY OPEN HOUSES

The fact situations in open house cases are fairly consistent. Once an open house is scheduled, the base begins an extensive planning process. Planning includes security arrangements, selection of participants, crowd control, parking, and other issues involved in opening an area to as many as 100,000 visitors over the course of a day. In almost all situations, the open house is limited to a portion of only one day.

Of particular importance to the first amendment issue is the selection of participants. These generally include base activities of an official nature, such as security police units and the chapel, and officially recognized private organizations, such as model airplane builders and squadron support activities. They may also include military resources external to the base, such as the Thunderbirds flying demonstration team or military recruiters, and non-military activities, such as the Confederate Air Force, a group dedicated to preserving and displaying vintage aircraft from previous wars. Finally, groups involved in military activities but not part of the military organization, such as defense contractors, are sometimes included.

Participation by the groups can take basically two forms. If the group is interested in recruiting or promoting its cause, it may operate a booth or an area in which its members hand out brochures and pamphlets or display their activity, such as flying radio-controlled planes. Other groups may use the event as a fund-raising activity, operating refreshment booths or selling crafts or souvenir items.

It is at the point of selection of participating groups that the potential for first amendment conflict arises. In some cases, political groups such as anti-war or disarmament groups have requested that they be included as a participating group in the open house activities.⁶⁹ If so, the installation commander is faced with the responsibility of approving or disapproving the request.

If no request is made for inclusion in the activities, the other point at which the issue arises is during the open house itself. Individuals or members of a political group may seek to convey their message, either by a demonstration or by passing out information on their cause.⁷⁰ Because this is unapproved activity from the point of view

⁶⁹See, e.g., *Persons for Free Speech* at SAC, 675 F.2d at 1012.

⁷⁰See, e.g., *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.) (Affidavit of Plaintiff Griffen); *Brown v. Palmer*, 689 F. Supp. 1046, 1047 (D. Colo. 1988).

of the base officials, this usually results in an order to cease the activity. If those involved in the activity do not obey the order, then arrest, expulsion, or a seizure of the material used to convey the message is carried out by the security police. Of course, compliance with the order results in repression of expressive activity, which can be challenged in a later legal action.

Regardless of the particular fact situation, the issue remains fairly clear. Does the installation commander have the authority to exclude some types of speech from the audience at the open house based on its content, or do individuals in the general public have a right to engage in speech unrestricted save for content-neutral time, place, and manner restrictions?

A. THE GOAL OF GOVERNMENT RESTRICTIONS

The first inquiry in the focused balancing approach is to determine the government's goal in imposing the restriction. Once that goal is articulated, the goal must then be examined to determine whether it is related to the context and the content of the affected speech. In the open house cases, the military has identified the goal of maintaining a politically neutral military in both fact and perception. The restriction intended to accomplish this goal is to prohibit "political" speech on military installations, including periods when the base has been opened for the public's examination.⁷¹

The first challenge to the articulated goal in present cases is that "political" speech has never been defined adequately, placing too much discretion in the commander of the installation.⁷² Farber and Nowak require that the government articulate "precisely what speech is permissible in the context covered by the regulation."⁷³ There is some question as to whether the Air Force has been successful in bearing its burden of communicating what type of speech is impermissible. Probably the most forthright effort to communicate the limits of prohibited expressive activity occurred at Griffiss Air Force Base in 1984, where personnel passed out letters from the base

⁷¹*Brown v. Palmer*, 689 F. Supp. at 1049 (Welch Declaration).

⁷²*Cf. Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.) (Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss or for Summary Judgment, and in Support (sic) Plaintiffs' Cross-Motion for Summary Judgment, at 10).

⁷³Farber and Nowak, *supra* note 28, at 1243.

commander to most visitors as they arrived.⁷⁴ Even there, however, the letter's reference to "any political activity and any action detrimental to good order and discipline"⁷⁵ may be attacked as insufficiently specific to put the public on notice as to the parameters of the restriction.

The definition of political speech is to be found instead in the underlying goal itself. If the goal is to prevent the military from becoming entangled in ideological controversies, then some observations follow. First, the goal would not support restrictions on private discussions between individuals, even if the subject was highly controversial. Since the concern is over turning the installation into a forum for debate over political issues, private discussion poses little danger to that interest. Second, the prohibition would not apply to what have been termed "clothing" messages,⁷⁶ such as slogans on t-shirts and buttons. In both instances there may be a threat of violent reaction to the speech, but restrictions on either of these would be unrelated to the government's goal in the context of an open house of preventing the military installation from being turned into a forum for political debate.

Instead, the category of political speech must be limited to an appeal by a person or group to the public on behalf of a cause that is normally committed to those branches of the government charged with policy-making authority.⁷⁷ Thus, advocacy of such issues as the

⁷⁴*Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.) (Affidavit of Staff Judge Advocate dated April 29, 1985.) The relevant portion of the letter reads:

I am pleased to welcome you to Griffiss Air Force Base today as our guest. I invite you to enjoy the Air Force's precision flying team, the Thunderbirds, with us. I also want you to see how we are carrying out the missions assigned to us by the president and Congress. Because I am also charged with maintaining security and order on Griffiss, I must prohibit any political activity and any other action detrimental to good order and discipline. I must also require that you stay within the boundaries outlined on the map below and that you follow the directions of the Security Police.

Id.

⁷⁵*Id.*

⁷⁶*Persons for Free Speech at SAC*, 675 F.2d at 1020 n.9.

⁷⁷This definition would prohibit speech of the sort involved in the open house cases thus far encountered by the courts. Another category of speech that may be constitutionally limited is speech that is non-political but which has no relation whatsoever to the military or to the subject of the open house. In fact, a threshold question in determining groups allowed to participate in the open house is whether that group's function is related to the base, including base community life. The legitimate government interest in that case would simply be limiting participation in the open house to organizations that are related to the purpose of the open house, to show the public "who we are." Thus, commercial advertising, product demonstration, or solicitation for charitable or religious activities would be excluded, not because they constitute political speech, but because they are incompatible with the planned activity. Note, however, that if open houses are considered to be public forums, it becomes much more difficult to make these distinctions or even to demand prior approval. Instead, only time, place, and manner restrictions are enforceable.

size of the military budget, the use of nuclear weapons, the propriety of abortion, provision of housing for the indigent, and other issues would be properly restricted. The basis for this definition is that political policy-making is not properly within the province of the military. Instead, these questions are properly committed to those portions of the executive, legislative, and judicial branches of government vested with authority to resolve such questions. It is the appeal to the public for support of ideological causes that is the defining characteristic of such "political speech."

Moreover, the goal of political neutrality of the military is unquestionably related to the category of political speech within the context of an open house. That groups consider a political message presented in the context of an open house to be a powerful persuasive tool is demonstrated by the efforts groups exert in seeking to gain admission. Moreover, political speech in the context of a day given to the public's examination of the activities of our armed forces may be all the more forceful, because it is not unlikely that the message will be viewed as possessing the imprimatur of government approval.⁷⁸ The most efficient and arguably the only effective means of pursuing that end is to ban all political speech.

The courts are prone, it seems, to forget the true basis of the objection by the military to such speech activities, and instead assume they are concerned with the good order and discipline of the activity and the troops. For example, in his decision in *Brown v. Palmer*⁷⁹ the district court judge noted that "these activities can be permitted without interference with the other open house activities."⁸⁰ In reaching this conclusion, the judge appeared to focus only on the physical aspects of the expressive activity, which of course are perfectly consistent with the open house. He failed to give sufficient weight or thought to the effect of such activity on the political neutrality of military installations or to the question of other political groups that might seek future admission to advocate their causes. Such a miscellany of groups espousing their political viewpoints would transform the nature of the open house completely and would in all likelihood force the military to forego the open house.⁸¹

⁷⁸The likelihood of government approval being presumed is greater to the extent that the group is identified in the public mind with the interests of the Air Force. Thus, a group from the Veterans of Foreign Wars advocating a constitutional amendment to protect the flag is more likely than an anti-nuclear power group to be identified with the Air Force in the mind of the public, and is more likely to gain approval from the government. Because the interest of political neutrality must be pursued regardless of the viewpoint, this remains a relevant factor to justify such restrictions.

⁷⁹689 F. Supp. 1045 (D. Colo. 1988).

⁸⁰*Id.* at 1052.

⁸¹*Id.* at 1049 (Welch Declaration).

In sum, the goal of political neutrality on military installations has been clearly articulated by the military and is specifically related to the category of political speech during the context of open houses. Having met the articulation requirement of the focused balancing analysis, the discussion turns to the permissibility of the goal itself.

B. THE PERMISSIBILITY OF THE GOAL OF POLITICAL NEUTRALITY OF THE MILITARY

The permissibility of the military's goal in imposing speech restrictions during open houses or selectively banning certain speech must be measured against the Constitution and the first amendment in that the goal must be viewpoint neutral. In the case of political neutrality of the military, it may be said that the goal is not merely permissible, but that it is obligatory. Because this is the central justification for the proposed restrictions, the case for requiring political neutrality bears examination.⁸²

There is no express provision in the Constitution for the political neutrality of the military. The principle is best viewed as a corollary for another constitutional principle, that of civilian control over the military. The mandate of civilian control of the military pervades our constitutional structure and stems from the deep distrust on the part of the Founding Fathers of a standing army.⁸³ Such a distrust was based on European and American experiences of great power wielded by a permanent armed force.

Despite the lack of an express constitutional provision providing for political neutrality, the textual limitations on the military provide strong support for the principle. For example, it is Congress that is empowered to "make rules for the government and regulation of the land and naval forces."⁸⁴ In addition, its appropriation power⁸⁵ and the power to declare war⁸⁶ are designed to balance presidential power as commander-in-chief of the Army and Navy.⁸⁷ Reliance on a militia was thought to be a safeguard against a large standing army,⁸⁸ and the Bill of Rights also contains express provisions that would limit the powers of a military force.⁸⁹

⁸²The phrase "political neutrality" is perhaps a misnomer, because it is not a concern over the military taking sides as much as a concern over involvement of the military in political matters. Perhaps a better phrase would be an apolitical military.

⁸³*Cf.* The Federalist No. 41.

⁸⁴U.S. Const. art. I, § 8.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* art. II, § 2.

⁸⁸*Cf.* The Federalist No. 29.

⁸⁹*See, e.g.,* U.S. Const. amend. II, III.

In addition to constitutional limitations, Congress and the Executive have taken steps to limit the encroachment of the military within the civilian branches of government. Various statutory prohibitions have been enacted to prevent military officers from assuming civil offices.⁹⁰ Presently, federal law prohibits military officers from holding a civil office that is elected, that requires presidential appointment by and with the advice of the Senate, or that is a position in the Executive Schedule.⁹¹ The history of congressional attempts to limit military officers from exercising power within the civilian government is perhaps marked more by exception than consistency,⁹² but the relatively small number of such attempts demonstrates the strength of the principle of preventing the military from influencing the political process.

The courts have uniformly recognized the principle of political neutrality as well, although with varied rationales for its existence and source. In *Greer v. Spock*⁹³ Justice Stewart relied on the "American constitutional tradition of a politically neutral military establishment under civilian control."⁹⁴ Justice Powell also gave great weight to the principle, stating:

Few concepts in our history have remained as free from challenge as this one. But complete and effective civilian control could be compromised by participation of the military qua military in the political process. There is also a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that civilian control remains unimpaired, and that undue military influence on the political process is not even a remote risk.⁹⁵

⁹⁰*E.g.*, Act of March 30, 1868, c.38, § 3 (40th Cong., 2d Sess.), 15 Stat. 58, R.S. § 1223 (prohibiting active and retired military officers from holding diplomatic or consular posts); Act of July 15, 1870, c.294, § 18(41st Cong., 2d Sess.), 16 Stat. 319, R.S. § 1222 (prohibiting Army officers from holding "any civil office").

⁹¹10 U.S.C. § 973(b)(2)(A) (1988).

⁹²In 1950 President Truman asked Congress to waive limitations in the National Security Act of 1947, Act of July 26, 1947 (80th Cong., 1st Sess.), 61 Stat. 495, which prohibited the appointment of anyone as Secretary of Defense who had served on active duty within the ten years preceding the appointment. Such a waiver was necessary to appoint George Marshall as Secretary of Defense. Congress agreed to do so without debate in the Act of September 18, 1950, c. 951 (81st Cong., 2d Sess.), 64 Stat. 853.

⁹³424 U.S. 828 (1976).

⁹⁴*Id.* at 839.

⁹⁵*Id.* at 846.

The Eighth Circuit Court of Appeals held the principle of military neutrality in high regard in its rationale for holding in *Persons for Free Speech at SAC v. United States Air Force*⁹⁶ that an open house was not a public forum. Even courts that disagree with the exclusion of political speech at open houses do not disagree with the principle, but only with its application.⁹⁷

While it is clear that the goal of the political neutrality of the military is a permissible goal, what of the question of viewpoint, as contrasted with content, neutrality? If political neutrality is pursued by suppressing only those views deemed hostile to the military, such a regulation of speech would fail the test of Farber and Nowak.

Initially, one may question whether the Court has actually required viewpoint neutrality in military contexts. In the past, courts have sustained regulations of speech in the military, and indeed criminal convictions, based largely upon the viewpoint of the speech. Although addressing the first amendment only with respect to an overbreadth challenge, in the case of *Parker v. Levy*⁹⁸ the Supreme Court addressed first amendment protections in a military context. That case involved a review of the court-martial conviction of an Army officer who urged blacks to refuse to fight in Vietnam because it was a racist war. In its written opinion, the Court cited the Court of Military Appeals' "sensible" exposition of first amendment doctrines by quoting from *United States v. Priest*,⁹⁹ in which the Court of Military Appeals stated:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is pro-

⁹⁶675 F.2d 1010 (8th Cir. 1982).

⁹⁷*Cf. United States v. Albertini*, 710 F.2d 1410 (9th Cir. 1983), *rev'd and remanded*, 472 U.S. 675 (1985), *on remand*, 783 F.2d 1434 (9th Cir. 1986); *Greer v. Spock*, 424 U.S. 828, 867 (1976) (Brennan, J., dissenting).

⁹⁸417 U.S. 733 (1974).

⁹⁹45 C.M.R. 338 (C.M.A. 1972).

tected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.¹⁰⁰

Other cases have also upheld first amendment restrictions in the military context based for the most part on viewpoint.¹⁰¹ Although the most pressing issue in *Greer v. Spock*¹⁰² was the ability of a presidential candidate to campaign on base, the Court also addressed the requirement of prior approval from the installation commander for distributing leaflets. There the Court went so far as to allow the prior restraint of materials found by an installation commander to be “a clear danger to loyalty, discipline, or morale, although not extending to material which the commander doesn’t like or critical of government policies or officials.”¹⁰³ Clearly this involves viewpoint discrimination on the part of the commander.

Despite the extensive restrictions allowed on service members, the Court quite clearly imposes a viewpoint neutrality requirement on military officials when they seek to impose speech restrictions on civilians addressing other civilians or military personnel. Thus, a threshold requirement for excluding political candidates from Fort Dix was that the commander “objectively and evenhandedly applied” the restriction to all political candidates.¹⁰⁴ The Court also upheld James Albertini’s conviction for reentry during an open house after being barred from the installation upon noting that the U.S. Code provision under which Albertini was convicted was content neutral. The Court cited the *O’Brien*¹⁰⁵ test approvingly, one tenet of which is that the regulation of speech be unrelated to the suppression of free expression.¹⁰⁶ Thus, while first amendment cases arising in the military context have sometimes abandoned a viewpoint neutrality requirement, those cases appear to be limited to regulations applying only to speech by or addressed to military members.

It appears to be self-evident that the principle of political neutrality satisfies a viewpoint neutrality requirement, because by its terms the principle excludes advocacy of all political causes regardless of the expressed viewpoint. Of course, the application of the principle

¹⁰⁰*Id.* at 570 (citations omitted).

¹⁰¹*Cf.* *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967); *United States v. Toomey*, 39 C.M.R. 969 (A.F.B.R. 1969).

¹⁰²424 U.S. 828 (1976).

¹⁰³*Id.* at 841.

¹⁰⁴*Id.* at 840.

¹⁰⁵*United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁰⁶*Id.* at 377.

of political neutrality may be such as to call into question the viewpoint neutrality of military officials applying the principle. That a principle may be abused, however, is not alone a basis for condemning it.¹⁰⁷

Of course, some groups argue that the objective of the military is not to promote neutrality, but to ensure that only the military's message will be heard. The objection is based on the contention that the military is itself engaging in political speech in trying to convince the public to support the military budget. This has been the strongest basis for judicial conclusions that open houses were public forums.¹⁰⁸ This objection is closely related to another, that allowing other groups to participate demonstrates that it is only adversarial speech that is prohibited.

Three types of speech are involved in most open houses. The first is that of the military itself, either in the form of military recruiters, military flight operations personnel, or military organizations. The second is civilian defense contractors, who offer information about the weapon systems that they provide to the military. The third is the speech of officially sanctioned private organizations.

As to the first argument, the fact that the military is promoting itself, the efficiency of its mission performance, or the excellence of its people should not result in a corresponding forum for alternative viewpoints. Such a position would prove too much. To propose that whenever the government speaks there arises a corresponding right to propose the alternative viewpoint would make a mockery of government attempts to communicate with the people. If a congressman holds a press conference in the Capitol, does it thereby become a public forum? If the President makes a speech at the White House urging the passage of a particular bill, does that turn the White House into a public forum? Certainly not. Of course, the Supreme Court has rejected such proposals on more than one occasion.¹⁰⁹

¹⁰⁷*Cf.* *Greer v. Spock*, 424 U.S. at 840.

¹⁰⁸*Cf.* *Brown v. Palmer*, 689 F. Supp. at 1051; *United States v. Albertini*, 710 F.2d at 1416.

¹⁰⁹*Cf.* *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981) (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974)). "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Id.*

Perhaps a more compelling argument can be made that allowing defense contractors to provide information about their weapon systems results in a corresponding right to provide information about their destructiveness and the disadvantages of spending large sums of money on their procurement. The dissenting judges in the Eighth Circuit's *Persons for Free Speech at SAC*¹¹⁰ case stressed this point. They concluded that those contractors had an excellent opportunity to engage in "institutional advertising" that would help influence military and civilian officials participating in procurement decisions as well as consumers who would be influenced to buy other products sold by the contractors.¹¹¹ The dissenters make far too much of this in light of the actual displays of information that the contractors provided. Even if such a benefit were realistic, such an institutional benefit to the contractor would be only incidental to the overall purpose of communicating to the public the means by which the military accomplishes its mission. More accurately, the contractor is simply providing information on behalf of the military about current weapon systems' capabilities.¹¹² If anyone should complain, it should be the competitors of the contractors. The situation is far more similar to the case of *Perry Ed. Ass'n v. Perry Local Ed. Ass'n*,¹¹³ in which the group allowed greater access achieved it on the basis of its status as the current provider of a service to the government rather than a substantive choice of the government to favor one group over others.

The strongest case can be made where the military has allowed other groups, not part of the official military structure, to participate in the open house activities. There the military officials must ensure that they make distinctions on legitimate, articulable grounds. In most cases, however, they have done so. The vast majority of groups allowed to convey their message to the public are groups that play an integral part in the life of the base community. Such groups as the boy scouts, model airplane clubs, officers' wives clubs, softball and other sports groups, and others are essential to communicating "who we are" to the community. Groups favorable to the military but unrelated to the installation have been uniformly rejected for participation.¹¹⁴ The one possible exception to this occurred at Grif-

¹¹⁰675 F.2d 1010.

¹¹¹*Id.* at 1024. One can only guess as to how a consumer would be influenced to purchase a can opener from a company because they make a great fighter.

¹¹²*Id.* at 1019.

¹¹³460 U.S. 37 (1983).

¹¹⁴*E.g.*, *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.) (Affidavit of Staff Judge Advocate dated April 29, 1985.)

fiss Air Force Base when the Confederate Air Force participated in the 1984 open house.¹¹⁵ The Confederate Air Force is a non-profit group that restores, displays, and demonstrates early military aircraft.¹¹⁶ Although not part of the Air Force, its display of the aircraft is certainly consistent with demonstrating the history of the Air Force. Attempts to characterize its activity as “lauding the bombing of Hiroshima and Nagasaki”¹¹⁷ are distortions of facts simply to support a legal argument.¹¹⁸

Interestingly enough, in the case of *Brown v. Palmer*,¹¹⁹ where the court found a public forum in an Air Force open house at Peterson Air Force Base, Colorado, and held it unconstitutional to prevent an anti-war group from passing out literature at the open house, the court found it significant that religious literature was passed out to the visitors by the Peterson Air Force Base chapel.¹²⁰ Whatever one may think about the constitutional propriety of military chapel and chaplains, the chapel is part of the overall mission organization of any installation, and its participation in the open house is as justified as that of a maintenance squadron explaining how efficiently it fixes planes.¹²¹ The court’s rationale raises the disturbing possibility of a base chapel becoming a public forum because religious services are held there.

Courts that have approached open house questions with an “equal access” mindset have lauded the virtue of a republican government’s commitment to “free and robust debate” of government policies. Such a debate is laudable but, like Justice Brennan’s opinion in *Creer v. Spock*,¹²² there seems to be no appreciation for the appropriate and inappropriate sites of that debate. It may be that the United States has succeeded so well in preventing the military from becoming a political force that we have forgotten the lessons of history calling for that prevention.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.* (Brief in Support of Plaintiffs’ Motion for Preliminary Injunction at 4).

¹¹⁸In actuality, the flyer describing the B-29 Superfortress expressly says it is not designed to “glorify war, but reminds us of those men and machines who won peace.” *Id.* (Joint Appendix at 79).

¹¹⁹689 F. Supp 1045 (D. Colo. 1988).

¹²⁰*Id.* at 1051.

¹²¹Perhaps if the chapel were overtly engaged in proselytization activities, a qualitative distinction could be drawn. But in the *Brown* case the flyers distributed by the chapel were largely informational, including the distribution of New Testaments of the Bible.

¹²²424 U.S. at 867-68.

C. THE BALANCING REQUIREMENT

Finally, having articulated the goal of the government restriction and finding that it is permissible, the interest of the government in its goal must be shown to outweigh its impact on speech. This requires scrutiny of the relationship between the regulation and the governmental goal to determine whether the regulation is reasonably likely to attain the goal and a determination of whether the goal is sufficiently important to justify the means.

The importance of the goal of political neutrality already has been discussed. Such a long-standing and agreed upon goal should be entitled to great deference. But it is not the goal of political neutrality or civilian control of the military that is at question. Rather, it is the use of a ban on political speech in the context of an open house that must be sufficiently related to the goal. Put more broadly, does a ban on political speech and debate at military installations further political neutrality? This appears to have been answered by the Supreme Court in *Grew v. Spock*.¹²³ But it is important to note Justice Brennan's counter argument in that case. He maintained that isolation of the military from exposure to alternative political influences is a threat to neutrality, because the overall organization is "highly susceptible of politicization."¹²⁴ Quite remarkably, he disapprovingly cited testimony of the commanding officer's representative that the base would discriminate on the basis of whether one would urge soldiers not to use illegal drugs versus, presumably, one who would advocate their use.¹²⁵ He appears to feel it is unfortunate that "the probability of sustained internal agitation or even questioning of the military system" would be unlikely after Vietnam.¹²⁶ He reveals a total misunderstanding of the notion of political neutrality. It is fundamental to the concept of a non-political military that military members do not enter into a debate over the propriety of accomplishing their mission. It is a desire *not* to turn the military installation into a marketplace of ideas concerning the wisdom of their civilian leaders that drives the goal of political neutrality. Justice Brennan, on the other hand, would concern himself only with those actions tending to turn the military itself into a political faction. He fails to recognize that "sustained internal agitation" within the military, and particularly the debate over civilian-directed defense policy, is a logical first step in the development of such a faction.

¹²³*Id.*

¹²⁴*Id.* at 868.

¹²⁵*Id.* n.16.

¹²⁶*Id.*

A further argument against the ban on political speech in military open houses is that it is overbroad. Although this argument tends to follow a finding that the site is a public forum requiring the least restrictive means, it is also relevant to the requirement to justify the means used as required by Farber and Nowak's approach. The objection is made that political neutrality could be maintained by excluding partisan speech but by not excluding merely ideological speech.¹²⁷ With respect to the means chosen to achieve the goal of political neutrality, however, such discrimination rests on a distinction without a difference. The goal of neutrality is not limited merely to ensuring that the military does not support one party over the other, but also to ensuring that it does not support one side of an issue over another, at least where the debate concerns issues more properly given to the other arms of the government. In the first place, ideological positions are generally identified with political parties, so that debate over one leads to an effect on the other. Moreover, the notion of a military that is involved even in non-partisan causes should be repugnant to those who fear an encroachment of the military within the government. Just as it is inappropriate for an installation to host political candidates, it would be inappropriate for the base to host those who espouse or oppose certain political agendas. That such advocacy of ideological causes would occur in the midst of open house activities does not change that judgment.

Finally, under the focused balancing approach one must examine the extent of the restrictions on free speech, bearing in mind the obligation to consider not only the particular parties seeking to advocate their causes, but also the broader interest of the nation in maintaining free speech against incremental restrictions. It should be clear that sufficient alternatives exist for the type of speech involved in these cases. The chief advantage that the parties who seek the open house forum would obtain is exposure to a large number of people, brought there by no action of these parties. Of course, because the installation commander is under no compulsion to provide this forum, these parties do not have a long-standing proprietary interest, such as is the case for streets and parks.¹²⁸ It is significant as well that this forum is in place for only one day per year. Of course, the groups are not prohibited from taking advantage of the large collection of people travelling to and from the open house by passing out leaflets or displaying signs along the streets leading to the base.

¹²⁷*Cf.* *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (**N.D.N.Y.**) plaintiffs' Motion for Preliminary Injunction at 14).

¹²⁸*Hague v. C.I.O.*, 307 U.S. 496 (1939).

If there is an interest in communicating with this specific audience, those means would be sufficient to allow that contact. What should be clear is that ample alternative means exist for groups to advocate their causes to the general populace without the need for injecting themselves into open house activities. Even after taking into account the interest of all the public and our commitment to free speech principles, it would appear that the groups seeking admission have a very small interest indeed. What is sought by such groups is not access to the public, but dramatic exposure to the media through staged events, such as holding a "Carnival of Death" banner beneath the display of a B-52.¹²⁹ Such publicity seeking may be consistent with the first amendment, but it is not of sufficient merit to outweigh the long-standing principle of military neutrality.

V. CONCLUSION

In summary, restrictions on political speech within the open house context are in full consonance with first amendment principles. The goal articulated by military commanders is clear and related to the type of speech and context of expression involved. The goal of neutrality is permissible, if not mandatory, for the military as an organization. Finally, the effect on free speech both for those involved and for the general public cannot be said to outweigh the legitimate interests of the government in these cases.

It is clear that this is the conclusion to which the Supreme Court decisions have pointed.¹³⁰ The approach taken here would reduce the uncertainty and risk of commanders and judge advocates tasked with the responsibility of informing the public and maintaining the political neutrality of military installations. Rather than reliance on categorization and labelling, the articulation of interests and forthright balancing of interests by courts under this approach would enhance the credibility of decisions.

One further point should be stressed. It may be that courts, distrustful of military command discretion, will continue to place commanders in difficult positions or to give little credence to rationales put forth for actions. To the extent that we in the military community act consistently with our stated principles, however, we

¹²⁹United States v. Albertini, 710 F.2d 1410 (9th Cir. 1983), *rev'd and remanded*, 472 U.S. 675 (1985), *on remand*, 783 F.2d 1434 (9th Cir. 1986).

¹³⁰With the exception of United States v. Flower, 407 U.S. 197 (1972), the Court has consistently upheld the constitutionality of military restrictions on political speech on military installations. See *supra* note 52.

will gain credibility and deference from the courts. It therefore falls to us to ensure that decisions purportedly based on neutral principles are principled, consistent, and not the result of bias against groups hostile to the military establishment and the current means of carrying out our national defense mission or of favoritism toward those groups perceived as friendly to the military.

BOOK REVIEW

ASSESSING THE PERFORMANCE OF THE BURGER COURT: THE ASCENT OF PRAGMATISM*

Reviewed by William S. Fields**

Bernard Schwartz, the Edwin D. Webb Professor of Law at New York University, is an internationally renowned constitutional historian whose multi-volume works on the United States Constitution and the Bill of Rights are regularly used by students, scholars, lawyers, and jurists. Professor Schwartz is, however, more than just a legal scholar. He is an author with the ability to present a complex subject, like American constitutional law, in a way that is understandable to the average educated individual.

In his recent work, *The Ascent of Pragmatism*, Professor Schwartz reviews and analyzes the operation of the Supreme Court during the seventeen years that Warren E. Burger served as Chief Justice. Although he discusses the major rulings of the era in considerable detail, his main focus is on the Supreme Court as an institution and the way in which it reached its decisions. Professor Schwartz analogizes the Court to a tapestry made up of strands that have been interwoven into a pattern. He purposely seeks to avoid separating out strands and looking at them alone. This he sees as defacing the tapestry as a whole and giving a false value to the individual strands. His analytical approach is intertwined with his view of the Court as "primarily a political institution" whose purpose is to "vindicate individual rights, strike down laws that are unconstitutional, and arbitrate between the states and the federal government and between the different branches of the federal government."

To accomplish his objective, Professor Schwartz relies upon a multitude of both oral and documentary sources. His oral sources

* Bernard Schwartz, *The Ascent of Pragmatism — The Burger Court in Action*. New York: Addison-Wesley Publishing Company, Inc., 1990. Pages: x, 482. Price: \$24.95 (hardcover). Chronology, Notes, Table of Cases, and Index.

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include personal interviews of members of the Court, former law clerks, and other knowledgeable individuals. His documentary sources (most of which have never been published) include conference notes, docket books, correspondence, notes, memoranda, and draft opinions. He makes reference to this vast quantity of material in a way that allows readers to understand and to examine for themselves the underlying bases for the conclusions that he draws. The end result is an interesting and insightful book that aids in demystifying the inner workings of what is perhaps the most enigmatic of our governmental institutions.

Professor Schwartz sees the Supreme Court under Chief Justice Burger as having been divided into weak liberal and conservative wings dominated by a pragmatic center composed of five Justices. His book chronicles the way in which this pragmatic center moderated opposing forces and worked toward the compromises necessary to transact the business before the Court. His review of its accomplishments leads him to conclude that the Burger Court was, indeed, an "activist" Court that consolidated the work of its predecessor, the Warren Court. The activism of the Burger Court was, however, the product of a fundamentally differing judicial approach. To Professor Schwartz, the activism of the Warren Court had as its basis two broad principles: "nationalism" and "egalitarianism." Nationalism was the preference for national solutions to what the Court perceived as national problems and a willingness to tolerate a substantial growth in federal power. Egalitarianism was a commitment to equality before the law and a fondness for the amorphous concept of "fairness" as a guide to judicial decisionmaking. Conversely, Professor Schwartz characterizes the activism of the Burger Court as a "rootless activism" produced by the exigencies of the circumstances. Its activism was a direct consequence of the division between the Justices and was devoid of underlying ideals. Thus, Professor Schwartz sees the Burger years as signaling an end to the great conflict between judicial "restraint" and "activism" and as a beginning to the conservative activism of the Rehnquist Court: "We are all activists now."

Regardless of whether you agree with Professor Schwartz's conclusions, *The Assent of Pragmatism* makes for interesting and informative reading. It is a well-researched, thoughtful analysis by an eminent constitutional scholar. It examines the contributions of the Burger Court in their broader historical context and is a useful resource for both lawyers and nonlawyers seeking a better understanding of modern constitutional law and process.

By Order of the Secretary of the Army:

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U.S. GOVERNMENT PRINTING OFFICE: 1989-261-882:00004